The Central Law Journal.

ST. LOUIS, JUNE 18, 1880.

NAMES OF COMPANIES.—II.

Since what it is sought to prevent is the attraction to itself by one company of business intended for another company, it is evident that the remedy would be very inefficient if it could only be called for when the two names were identical. Hence the rule is, that protection will be granted, not only against identical names, but against names substantially the same. Hence, in Lee v. Haley, Lord Justice Giffard speaks of the assumption by a defendant of "the same name, or the same name with a slight alteration" as the plaintiff uses; hence, in Brooklyn White Lead Company v. Masury,[1] Mr. Justice Mitchell, in the Supreme Court of New York, states that "any false name that is assumed in imitation of a prior true name" is in violation of the right of the owner of that prior name. It is seldom, indeed, that it is the same name that the defendants adopt, but when that is the case, the plaintiff is generally relieved from discussing the probability of deception, since there can be little doubt of that probability. However, in Lawson v. Bank of London, and Newby v. Oregon Central Railway Company,[2] the plaintiff failed—in the first case, because he had not pleaded that he had actually used the name by carrying on business; in the second case, because the plaintiff was not the injured company, but a bondholder and creditor of that company, who was held not to be entitled to sue until the company had itself refused to take proceedings. In the India Rubber Comb Company v. Meyer,[3] the plaintiffs succeeded.

When the names are not identical, but only more or less similar, then it is that the second point suggested by Vice-Chancellor Shadwell, in the London and Provincial Society's Case, comes to the front, and it becomes necessary for the court to consider "whether, taking all the names together, it is or is not apparent that there is such a deceptive quality as is likely to produce the injury complained of." And in estimating the probability of deception, a right conclusion has to be arrived at, not only by examining the names side by side, but also by weighing the other circumstances of the case, as will be seen from a recapitulation of the decisions.

The first case on the subject was that of London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Company,[4] in which Vice-Chancellor Shadwell thought that no deception was probable, and that there was a doubt as to the length of user, and consequently refused to grant an injunction on motion, but directed an action to be brought. Next came Purser v. Brain,[5] in which "The London Manure Company" sought to restrain the use by another company of the name "The London Patent Manure Company," and the same result followed, there being again a question as to the length of time during which the plaintiffs had traded under their name. Then comes the case before the Supreme Court of New York, Brooklyn White Lead Company v. Masury,[6] in which, the plaintiffs being in the habit of labelling their kegs of white lead "Brooklyn White Lead Company," the defendant at first labelled his "Brooklyn White Lead, pure, 100 lbs.," and afterwards changed this to "Brooklyn White Lead and Zinc Company," and was restrained by injunction. In this case the name lastly adopted was extremely similar to that which the plaintiffs used, and the change from the former inscription testified to the defendant's *animus*. Besides the application of the name to the goods sold by the parties introduced somewhat special considerations. In the case of London Assurance v. The London and Westminster Assurance Corporation (Limited),[7] Stuart, V. C., did not think the case was one in which he would be justified in granting an injunction; and in The Colonial Life Assurance Company v. The Home and Colonial Assurance Company (limited),[8] Lord Romilly, M. R., refused an injunction, and said that he consid

[1] 25 Barb. S. C. 416.
[2] 1 Deady, 609.
[3] N. Y. S. C. 1875.
[4] 17 L. J. Ch. 37.
[5] 17 L. J. Ch. 141.
[6] *Supra.*
[7] 32 L. J. Ch. 664.
[8] 12 W. R. 783, 33 Beav. 548.

ered that the real object of the motion was to obtain a monopoly of the word "colonial." Next after these cases comes one which has already been frequently cited, and which is very much referred to in practice, that of Lee v. Haley, in which Malins, V. C.,[9] and Lord Justice Giffard,[10] were of opinion that a limited injunction must be granted. There the plaintiffs were coal merchants, carrying on business in Pall Mall, under the name of "The Guinea Coal Company," and the defendant was a former manager of the plaintiffs, who set up business in the Strand under the name of "The Pall Mall Guinea Coal Company," and afterwards, still trading under the name, removed to Pall Mall, a few doors from the plaintiffs' establishment. The attempt was too barefaced, and an injunction was granted, but it was thought that sufficient protection would be afforded to the plaintiffs by restricting the prohibition to Pall Mall, and the injunction was accordingly limited in that respect. In Holmes, Booth & Haydens v. Holmes, Booth and Atwood Manufacturing Company, two of the principal promoters of the plaintiff company left it, and established the defendant company, under a title in which their own names were again very prominent. The circumstances connected with the formation of the defendant company could not be overlooked, and the Supreme Court of Connecticut restrained the use of the two names. The list ends with four more cases which have come before the Chancery Division within the last few months, in all of which the plaintiffs failed. In London and County Banking Company v. Hampshire and North Wills Bank,[11] the Master of the Rolls declined to restrain the defendants from changing their name to that of "The Capital and Counties Bank," thinking that deception was not probable. In Merchant Banking Company of London (limited) v. Merchant's Joint Stock Bank,[12] after dealing with the provision in the Companies Act of 1862, which will be noticed presently, the Master of the Rolls again thought that deception was not probable, and refused the motion. And it is worthy of note that he specially adverted to the fact that the plaintiff company carried on business in Cannon-street, and the defendant company had taken premises in Bloomsbury, which went far to negative the probability of an intention to appropriate the plaintiffs' business. In fact, in this respect this case may be advantageously contrasted with Lee v. Haley. Then in Army and Navy Co-operative Society v. Junior Army and Navy Stores (Limited),[13] again before the Master of the Rolls, the latter was of opinion that the prefix of the word "junior" to the defendants' name was quite sufficient to prevent deception, and he laid stress on the fact, peculiar to this case, of the customers of the plaintiff society belonging to a special class, since by the rules of the society they must be shareholders or persons introduced through shareholders, and must, therefore, be well aware of the identity of the two societies. The last case is Australian Mortgage, Land and Finance Company v. Australian and New Zealand Mortgage Company,[14] in which the Court of Appeal affirmed the decision of Malins, V. C., refused to interfere with the name of the defendant company, which was not so similar to that of the plaintiff company as to be likely to cause deception, besides which it was a mere description of the business done by the company, and contained no special catchword. From this review of the cases it will be seen that the measure of success attained by plaintiff companies has been very moderate indeed, and that litigation in such cases can not be recommended unless the circumstances pointing to fraud are unusually strong. The fact is that the choice of names by which a new company can designate itself, so as to satisfy the double purpose, of describing the character of its own operations and distinguishing itself from the companies already in the field, is necessarily very limited, and the exercise of too great stringency by the courts might easily result in a monopoly of various classes of business being practically secured for the old established companies.

The 20th section of the Companies Act, 1862, to which reference was made above, is in the following terms: "No company shall be registered under a name identical with that

[9] 18 W. R. 181.
[10] 18 W. R. 242, L. R. 5 Ch. 155.
[11] June 7, 1878.
[12] 26 W. R. 847, L. R. 9 Ch. D. 560.
[13] January 17, 1879.
[14] January 17, 1880.

by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved, and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name." This section was fully considered by the Master of the Rolls in the Merchant Banking Company's Case, in which it was much relied upon by the plaintiffs. Both companies had there been registered, the defendants' name having been selected by the registrar from several submitted to him, and the Master of the Rolls laid down that, after registration, the prohibitive provision in the clause did not apply, since that was only aimed at the registration of similar names, and that where the registration had once been affected, the act no longer applied, and the case might be treated independently of the act, and simply with regard to the probability of deception. The section, he explained, would prevent the registration of similar names for companies, though they carried on quite different businesses, but when such cases were brought before the court apart from the act, there would be no equity to entitle the one to interfere with the name of the other, since the companies would not clash in their operations.

It seems that the name of a company may be registered as a trade-mark under the Trade-Marks Registration Act, 1875, though when the name was not used as a trade-mark before the passing of the act, it would have to be "printed, impressed or woven in some particular and distinctive manner." By the United States Trade-Marks Registration Act, 1870, the Commissioner of Patents was prohibited from receiving and recording any proposed trade-mark which was "merely the name of a person, firm or corporation only," but this prohibition was qualified by the proviso that the section should not "prevent the registry of any lawful trade-mark rightfullly used at the time of the passing of the act." Under this proviso it has been decided [15] that the names of corporations may be registered when they were in actual use as trade-marks on July 8, 1870. It is true that the American Trade-Marks Registration Act has been recently declared by the Supreme Court of the United States to be void, as having been enacted outside the limits set for the Legislature by the Constitution of the United States;[16] but it seems probable that steps will, before long, be taken by which the act will be substantially re-enacted.

UNANIMITY OF JURIES.

It has been contended that it would be useless at this late day to attempt to reform the jury system; that if it is not perfect, it would be difficult to find its equivalent. To say that we are behind England in the progress of legal reform would be untrue, but even in that country a majority vote is held sufficient to sustain a verdict under certain circumstances. By stat. 17 and 18, Vict. c. 59, in civil cases where juries are unable to agree after a deliberation of six hours, the verdict of nine may be taken as of the whole. In fact in every civilized country on the continent in civil cases there is no jury, and in penal cases no unanimity is required, a specified majority of jurors establishing a verdict. Lieber's Civil Liberty and Self Government. Many advocates of such a system will be found in this country. They say that it is often impossible to get a jury in civil cases capable of rendering a verdict consistent with the law and facts in a case; the jurors of our State courts being drawn frequently from the lower classes of society are incompetent to perform their functions, by reason of profound ignorance, utter lack of principle, entire disregard of truth. Their sympathies are won by the eloquence of the pleader, their prejudices aroused by the nature of the cause, and even if they are honest in their convictions, an appeal to reason, a clear statement of the law, have no weight in altering preconceived but erroneous notions of right and justice. Hangers on about a court-house, dead beats and loafers who generally compose our juries, are not likely to understand the law as laid down by the court, and in many instances the facts as elicited by the testimony. Lacking intelligence, they are incapable of arriving at reasonable conclusions. Without principle, they are unable to appreciate the distinctions between the right and wrong of a case. As non-freeholders they have no sympathy with the rights of property. It is sufficient to know that a corporation is sued to render a verdict against it, and in an ac-

[15] *In re* India Rubber Comb Company, 8 U. S. Off. Pat. Gag. 905; *In re* Rubber Clothing Company, 10 Id. 111.

[16] See 7 Cent. L. J. 449.

tion for damages by reason of alleged injuries, the only question which seems worthy of consideration is, how much the plaintiff is entitled to, as it is taken for granted in the beginning that he ought to get something.

A writer on this subject lays down three propositions which he endeavors to controvert, but they are the strongest evidences against his cause, the object of which is to maintain the unanimity principle. 7 Amer. Law Reg. O. S. 314.

1. It is often impossible to convince twelve men of the truth or falsity of a cause.

2. All analogy, social and political, approves of the majority system.

3. It enables one man by "holding out" to nullify the vote of the other eleven.

By a sweeping statement each of these propositions is negatived without alleging any intelligent reasons, and the conclusion is reached that a unanimous verdict is the best, because it implies deliberation, because it is the most correct, and because it is the most respected. The conclusions are pretty safe as far as they go, but it must be admitted that they fail to prove his case. It is true that the unanimous verdict of twelve men may imply deliberation, but there is little reason to doubt that the vote of eleven men or of a less number may also imply deliberation. Nay, much more so, because those cases wherein juries are unable to come to any agreement and are consequently discharged, appear to have been more thoroughly "deliberated" than any other. It would seem that deliberation was not compatible with the doctrine of unanimity, for it has frequently happened that the longer jurors have deliberated upon a case, the less likely they were to agree on a verdict. In one case (People v. Goodwin, 18 Johns. 188) a jury was discharged after deliberating so long (seventeen hours) as to exclude all reasonable expectation of ever arriving at a verdict "unless compelled to do so by famine or exhaustion." In another (Com. v. Bowden, 9 Mass. 494) the jury had "been confined together during part of a day and a whole night, and returned into court and informed the judge that they had not agreed upon a verdict and that it was not probable that they ever could agree." One of the jurors was withdrawn and the panel discharged and the prisoner tried again by another jury during the same term and convicted, and the question came up on motion in arrest of judgment. And in another, (Com. v. Purchase, 2 Pick. 521,) on a capital trial the jury was discharged after a deliberation of eighteen hours, it appearing to the court that there existed a difference of opinion among them upon the evidence, which any further deliberation would have no tendency to remove. There was however a method of securing unanimity by deliberation which was not mentioned in the article alluded to and for which some analogy is furnished, and that was the practice of carting the jury about the circuit as matter of indignity to them, by way of punishment for not performing their duty, or the custom said to have been in vogue in Ireland at one time, of carrying them in a covered wagon along with the judge of the circuit, to give them more ample time to digest the case and come to an agreement, and the still more ancient mode of taking the verdict of eleven jurors if they agreed and committing the "refractory juror" to prison. Forsyth's History of Trial by Jury. The statement that the verdict of twelve men is more correct than that of a less number is not denied, but it may equally be said that the vote of nine men is generally more correct than that of three, or of a majority than a minority. When the judges of our appellate courts render strong dissenting opinions in the minority, tribunals by the way where the unanimity principle has never prevailed, we take the opinions of the majority as more correct and better law. It may occasionally happen that the minority of a jury possess the greatest intelligence, but as a general rule, the same reasons exist for supposing all things equal in the one case as in the other. As for the verdict of twelve men being more likely to command respect than that of a less number, it is submitted that if a majority vote were held sufficient to sustain a verdict, a man would stand as fully acquitted before the community under that verdict as though it were a unanimous vote, when a disagreement under the unanimity principle frequently sets him free. In addition to the above propositions another reason may be urged in support of the majority theory.

4. The unanimity principle is the cause of frequent disagreements of juries and repeated trials for the same offense.

Many courts hold that in capital cases it is no sufficient ground for discharging a jury without the consent of the respondent, that the jury are unable to agree upon a verdict, and that if the jury is so discharged it is a bar to any further prosecution for the same offense. Com. v. Clue, 3 Rawle, 498; State v. Ephraim, 2 Dev. & Batt. 162; Com. v. Cook, 6 S. & R. 577; Williams' Case, 2 Gratt. 567; while in others this doctrine is denied, and Mr. Justice Story in one case says, "The prisoner has not been convicted or acquitted and may be again put upon his defense. We think in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act as the ends of public justice would otherwise be defeated." United States v. Perez, 9 Wheat. 579; People v. Goodwin, *supra;* People v. Green, 13 Wend. 55; Com. v. Bowden, *supra;* Com. v. Purchase, 2 Pick. 521. In another, where the jury after having deliberated for sixteen hours returned into court and propounded to the court a question, and having received instructions retired and again deliberated for seven hours when they returned into court and reported their inability to agree upon a verdict, the jury was discharged and the prisoner remanded for another trial. The prisoner was again put on trial and found guilty of murder in the first degree. Then his counsel filed a motion in arrest of judgment because "the court put the defendant upon trial a second time after having

against his objection and without sufficient reason, discharged the jury impanneled and sworn to try him upon the same indictment, and thus placed him a second time in jeopardy for the same offense." The motion was overruled, and on appeal the court say: "If a verdict can not be obtained upon one trial, another may be lawfully had, and the unavoidable delay which ensues is the fault of no one. For the better protection of the accused the law requires unanimity in the jury before a verdict can be rendered; but to allow on the one hand, the ignorance, perversity, or even honest mistake of a single juror to paralyze the administration of justice and turn loose upon the community the most dangerous offenders, or on the other, to allow the government to trifle with the constitutional safeguards of the accused, would equally subvert the foundation principles upon which the criminal code is administered." Dobbins v. State, 14 Ohio St. 493.

Where a disagreement of the jury is equivalent to an acquittal, it may not be material that there be a unanimous verdict of acquittal for the same object is accomplished without it. If it is not a bar to a further prosecution, is the prisoner not really tried twice for the same offense in violation of the constitutional doctrine prohibiting it? The authorities tell us that there must be both verdict and judgment shown in order that the plea of *autrefois acquit* or *autrefois convict* may be made available (4 Black Com. 335; United States v. Haskell, 4 Wash. 402; United States v. Gilbert, 2 Sumn. 19), but may it not be said that there is as much a trial in a criminal case where there is a disagreement of the jury as where there is not, with the difference that a verdict is rendered in the one case, and in the other there is none? There may be exceptions such as are instanced in some of the cases cited. As where one of the jurors manifested symptoms of insanity after the jury had been kept together three days, and more than twenty-four hours without refreshment, and it was held that a discharge of the jury was no bar to a further prosecution (United States v. Haskell, *supra*) or where an indispensable witness for the prosecution being committed by the court for contempt in refusing to give testimony, the jury was discharged and the cause postponed. United States v. Coolidge, 2 Gall. 364.

Cases of that kind may furnish reasonable grounds for discharging a jury and justifying a further prosecution, inasmuch as there has not been afforded a full and fair trial of the accused. If on the other hand the jury has been given ample time for deliberation, and that time seems to be left to the discretion of the court, and they announce their inability to agree, however long they may remain out, it is difficult to distinguish the difference between those cases and such as are in keeping with the doctrine prohibiting a second trial for the same offense. What if a second trial should result in a disagreement and discharge of the jury? In fact an indefinite number of trials might be had without result, and unless the "afforcement" plan was brought into requisition, it might be impossible to acquit or convict the prisoner. Whether the constitutional doctrine is violated or not, it is at any rate affirmed that under the unanimity principle the cause of justice is delayed by repeated trials, or criminals escape conviction altogether from constant disagreements of juries.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — CONSTRUCTION OF STATUTES.

FAIRCHILD v. MASONIC HALL ASSOCIATION.

Supreme Court of Missouri, May, 1880.

1. The words "perpetual succession" used in the charter of a private corporation, without further words of limitation or restriction, mean an indefinite duration, and are not to be understood in the sense of continuous or uninterrupted succession. The existence of such corporations is not limited to the term fixed by the general statute on the subject of corporations.

2. The individual liability of a stockholder is fixed by the law in force at the time he becomes such, and can not be changed by subsequent constitutional or legislative enactment.

3. Under the statutes of Missouri, no double liability was imposed upon one who, in 1864, became a stockholder in a corporation organized in 1853. The section in the statutes of 1845 creating such liability was expressly repealed by the revision of 1855; and the corresponding section in the statute of 1855 applied by its terms only to corporations created after that revision took effect.

Appeal from the St. Louis Court of Appeals.

John C. Orrick and *J. H. Overall*, for appellant; *A. & J. F. Lee, Jr.*, for respondents.

NAPTON, J., delivered the opinion of the court:

The decision of the Court of Appeals in this case is based on the point that the charter of the company, although containing the words "perpetual succession," was limited by the general statute which confined the duration of all corporations, where there was no limit in the charter, to twenty years; and as the suit against this corporation was brought after the expiration of twenty years, the judgment against the corporation was a nullity, and, of course, that the execution issued against the stockholder could not issue upon a void judgment against the corporation.

That the word "perpetual" is frequently used in the sense of "continuous and uninterrupted" is well established by our lexicographers, and the practice of eminent writers and speakers. That another meaning of indefinite duration is also legitimate is equally clear, and the one or the other may be adopted, according to the context and the subject-matter, relative to which the word is used. The words "perpetual succession" are here used in the charter of a private corporation, and would naturally mean, if unrestricted by other terms, of indefinite duration.

That various charters were granted by the legislature with the words "perpetual succession," which were also restricted to a term of years designated in the same charter, can hardly lead to

any conclusion as to such charters as contained the words "perpetual succession," without any such limitation. The additional limitation to a specified term would undoubtedly fix the duration of the corporation, notwithstanding the use of the words "perpetual succession, and require these terms "perpetual succession" to be understood in the sense of continuous and uninterrupted —a meaning confessedly appropriate when the context and subject-matter require it. But such a construction does not lead to the conclusion that, in charters containing the words "perpetual succession," with no limitations upon the duration of the corporation, the legislature used these terms as equivalent to continuous or uninterrupted succession.

From 1845, when this provision in regard to charters which contained no limitation was first adopted, down to 1865, the session acts every year will be found to be crowded with charters of private corporations for schools, colleges, bridges, roads, library associations, literary and scientific associations, benevolent and religious associations, etc. It is unsafe to base any conclusion upon the variety of terms used in these acts, some of which use the terms "perpetual succession", and others "continuous succession." A vast number of these charters repeal the right of the legislature,—a right already reserved in the general law on the subject of corporations,—to make any alterations or repeal.

If the legislative construction of prior acts is entitled to any weight, it would seem that their action in regard to such charters as had merely the words "perpetual succession," without any qualification, was entitled to consideration as indicating that they did not use the words "perpetual succession" and "continuous succession" in the same sense. Take, for instance, the charter of the Hannibal & St. Jo. R. R. Co., passed in 1847, which has nothing more in it than the words "perpetual succession." The legislature, in 1851, directed the issue of bonds to the amount of a million and a half of dollars, none of which could fall due before 1871, long after the expiration of the charter, supposing it to have only a duration of twenty years. We have been referred to a great number of charters, where subsequent enactments imply an indefinite duration from the use of the words "perpetual succession." In fact, this is the case in relation to charters of schools, colleges and literary associations without number. We decline, therefore, to base any construction of the words "perpetual succession" upon a supposed construction given of them by the legislature, inasmuch as their enactments have been somewhat conflicting and variant, and we therefore prefer adopting the natural and ordinary acceptation of the terms.

In 1864, Mrs. Hunt became a stockholder. Her liabilities were fixed by the law then in force, and could not be affected or changed by any subsequent enactments, either of the convention of 1865 or the legislature which passed laws in accordance with the Constitution then adopted. The question then is, what law was in force in 1864 which imposed on her a double liability? By the 13th section of the act of 1845 a double liability was imposed on all stockholders of corporations created after the passage of that act. In 1855 that act was revised; and the 20th section of the act concerning laws declares that, "all acts or parts of acts of a public, permanent and general nature, revised at the present session of the general assembly, so soon as such acts take effect, shall be construed as repealing the acts in force at the commencement of the present session of the general assembly so revised." The 13th section of the act concerning corporations so revised in 1855 says: "In all corporations hereafter created by the legislature, unless otherwise specified in their charter," etc., a double liability is imposed. The section is a mere copy *in haec verba* of the 13th section of act of 1845. If the 13th section of the act of 1845 was repealed, as it undoubtedly was, by the 20th section of the revision of 1855, the only law in force when Mrs. Hunt subscribed was the 13th section of the act of 1855, which declared a double liability upon the stockholders of all corporations "hereafter created." Now this corporation was created in 1853, before the passage of the act of 1855, and unless we can construe the word "hereafter" as meaning heretofore, or as meaning both hereafter and heretofore, there was no double liability imposed on the stockholders in the Masonic Hall Association in 1864. Moreover, the eighth section of this act of 1855, (Revised Code of 1855, p. 1024.) provides that, "whenever the term 'heretofore' occurs in any statute, it shall be construed to mean any time previous to the day when such statute shall take effect; and whenever the term 'hereafter' occurs, it shall be construed to mean the time after the statute containing such term shall take effect."

That this literal copy of the 13th section of the act of 1845 was a blunder on the part of the legislature may be conceded, but what authority is there on the part of the courts to correct it and insert the word "heretofore" instead of hereafter?

In City of St. Louis v. Alexander, 23 Mo. 509, this court remarks: "The effect of the revision of the charter on the 3d of March, 1851, was not to make former provisions which had previously existed, and which were continued, to begin from that date, but for convenience sake to embody all the acts in force at the time of the revision, to take date from the period when they were first passed. It would be of the most mischievous consequences to hold that the revision of a law had the effect of making the revised law entirely original, to be construed as though none of its provisions had effect but from the date of the revised law. When a former provision is included in a revised law it is only thereby intended to continue its existence, not to make it operate as an original act to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made."

In that case the repealing clause in the act of 1853 was that "all acts and parts of acts contrary to and inconsistent with the provisions of this act

or within the purview thereof," are hereby repealed, and we entirely concur in the views above expressed in that case.

But in the revision of 1855 it is declared that all acts or parts of acts revised at the present session of the general assembly, so soon as the revised laws take effect, shall be construed as repealing the acts in force at the commencement of the present general assembly, (whether consistent or inconsistent, contrary to or within the purview thereof.) In short, but one meaning can be given to this law, and that is that the new law was a substitute for the old one, and the former law was expressly repealed.

In the revision of 1865 this provision was materially changed. Section 5 says: "The provisions of the general statutes so far as they are the same as those of existing laws shall be construed as a continuation of such laws, and not as new enactments." There was no such provision in the revision of 1855, but an express repeal of the act of 1845, which was revised and a new law passed copying most of the provisions of the former act. Section 13, which created the double liability in 1845, was repealed and a new section adopted, copying literally from the old one, but unless we can conjecture that it was intended to apply to previous charters and substitute the word "heretofore" for hereafter, this clause in the act of 1853 did not apply to the charter of the Masonic Hall Association. It is not our province to form any conjecture concerning the intention of the legislature, except from what they have said, and they have confined the liabilities expressly to charters created after the passage of the act of 1855. So that in 1864 there was no double liability upon Mrs. Hunt as a stockholder.

That neither the Constitution of 1865 nor the act of the legislature passed under it could retroact so as to affect Mrs. Hunt's liability in 1864, is beyond question. State v. Sullivan County, 51 Mo. 522. The judgment of the Court of Appeals is affirmed.

NORTON, J., dissenting:

I do not concur in the conclusions reached in this case. The 13th section of the act concerning corporations in the revised statutes of 1855 is a literal copy of the 13th section of the act concerning corporations in the revised statutes of 1845, and for that reason should not be construed as an original law, taking effect only from the revision, but should be construed simply as a continuation of the law revised. St. Louis v. Foster, 52 Mo. 513.

PRINCIPAL AND AGENT — MIDDLEMEN — DOUBLE COMMISSIONS.

FRITZ v. FINNERTY.

Supreme Court of Colorado. December Term, 1879.

1. An agent of the owner to sell property, can not be an agent for the purchaser to buy the same. But the rule does not apply where the agent acts as a middleman to bring the parties together, or acts for both with the knowledge and consent of both.

2. One authorized to act as agent for another in selling property, can not become the purchaser and receive commissions for effecting the sale, except with the previous consent of his principal. The same rule governs a purchasing agent.

3. An agent to sell may become interested in the subject-matter of the sale, after the transaction is complete and his duties as agent ended. Thus, where an agent to sell a mine had bonded the property and obtained a deposit to be forfeited upon the obligee's failure to complete the transaction: *Held*, that though not discharged from his duty to consummate the bargain, he could assume the character of purchaser from or agent for the grantee, pending the time for consummatting the bargain, as the rights and duties thus assumed would not conflict with those of the seller.

4. When the court undertakes to instruct upon any point upon its own motion, it must not only instruct correctly, but fully, and for failure to do so the case may be reversed. It is error to give instructions unsupported by evidence.

Appeal from the District Court of Arapahoe County.

BECK, J., delivered the opinion of the court.

The most important questions raised by the assignment of errors in this case involve the subject of agency and the principles which must control the conduct of an agent in transactions between himself and his employer, and in his transactions with third persons in respect to the subject matters of his agency.

The general principles of law applicable to real estate brokers appear to be well settled, and rules defining their duties have been laid down and sanctioned by a long course of judicial decision; but difficult questions often arise, whether or not a given state of facts bring the agent within a rule which imposes a forfeiture of commissions for misconduct. On such questions some contrariety of opinion exists. The weight of authority favors a stringent application of these rules to all cases falling clearly within their reason; but as to all other cases, whenever it is made to appear that the agent is the procuring cause of the sale, the law leans to that construction which will best secure the payment of his commissions, rather than the contrary.

As applicable to the case under consideration, it may be observed that it is a well settled rule, that the same person cannot be both agent of the owner to sell, and agent of the purchaser to buy, for the reason that the interests of buyer and seller necessarily conflict, and the same agent cannot serve both employers with efficiency and fidelity. The interest of the agent conflicts with his duty in such case. His duty to the vendor to sell for the highest price, is wholly incompatible with his duty to the purchaser to buy for the lowest price, and these inconsistent relations, if assumed, would expose him to the temptation to sacrifice the interests of one party or the other, in order to secure his double commissions. Wherefore, it is the established policy of the law to remove all such temptations, and to this end every contract whereby an agent is placed under a direct inducement to violate the confidence reposed

in him by his principal, is declared to be opposed to public policy, and not capable of being enforced as against any person who has a right to object. The effect of the rule is, that if an agent act for both parties in the same transaction, he cannot recover compensation from either unless the parties knew and assented to his acting for both. The rule cannot be avoided by proof that no injury has resulted from his double dealing, for the policy of the law is not remedial of actual wrong, but preventive of its possibility. It is equally well settled that an agent to sell cannot become the purchaser, without the knowledge or assent of the seller; nor if he be employed to purchase, can he be himself the seller. These rules all rest on grounds of public policy. Everhart v. Searle, 71 Pa. St. 256; Rice v. Wood. 113 Mass. 133; Lynch v. Fallon, 11 R. I. 311; Raisin v. Clark, 41 Md. 158; Lloyd v. Colston, 5 Bush, 587; Kerfoot v. Hyman, 52 Ill. 512; Scribner v. Collar, 40 Mich. 378, 8 Cent. L. J. 205.

Illustrative of the character of cases not falling within the reason of the foregoing rules, and which constitute exceptions thereto, we note that it is held that if an agent or broker act openly for owner and purchaser, with the knowledge and assent of both, each having contracted to pay him a commission, he may recover the stipulated compensation from both parties. So also, if an agent be employed to sell at a stipulated commission, he may offer himself as a purchaser, and if accepted as such under the contract to pay commissions, he may purchase and be entitled to retain from the purchase money, an amount equal to his commissions; or if employed to purchase, the employer stipulating to pay him a given sum for the property, regardless of its cost to the agent,the sum so agreed upon may be recovered.

Again, if the extent of the agency be merely to bring the contracting parties together, and does not involve the duty of negotiating for either, the agent is termed a "middleman," and may contract for and receive from both. Stewart v. Mather, 32 Wis. 344; Shepherd v. Hedden, 29 N. J. L. 334; Mullen v. Keetzleb & Lampton, 7 Bush, 253; Herman v. Martineau, 1 Wis. 151; Seigel v. Gould, 7 Lans. 178; Anderson v. Weiser, 24 Iowa, 430; Merryman v. David, 31 Ill. 404.

Appellants insist in this case that the evidence shows Fritz, the plaintiff, to have been guilty of such gross misconduct as forfeits all claims he may have had against them for commissions. It is shown by the record that on the 28th day of October, 1878, the appellants executed to Davies a bond, conditioned to convey unto him the Little Chief mine at Leadville, provided he paid the sum of $300,000 purchase money therefor in thirty days, and containing also a stipulation for an extension at thirty days, on payment of the sum of $25,000 as a forfeit, in the event that the purchase should not be consummated. On the succeeding day, Davies and Fritz entered into an agreement in writing, associating themselves together as partners in the business of buying, selling and trading in mining property, and containing the following stipulation concerning the mine in question: "And it is further expressly agreed that the said Jacob S. Fritz, is to have and receive one-third share of the gross net proceeds, free from all cost and expense, that may be received and realized over and above the respective amounts mentioned in certain bonds for the sale of the Little Chief mine and the Union Lode in California mining district in said county of Lake, said bond having been made to the said John Davies, by the parties therein named respectively, on the 28th day of October, A. D. 1878." Subsequently it becoming evident that the sum named in the bond as forfeit money would have to be raised, since a sale of the mine could not be effected within the first thirty days, Davies & Fritz entered into an agreement with Oviatt & Cooper, to share with them the profits which might be realized on a sale of the mine, upon condition that the latter parties advance the $25,000 forfeit money. The money was raised under this arrangement, and paid to the appellants on the 26th day of November. The bond was assigned to Oviatt and Cooper, and appellants executed to them a deed of the mine, bearing date the 26th day of November, 1878, and placed the same in escrow, to be delivered on payment of the balance of the purchase money. On the 23d day of December, 1878, a sale was effected under the Oviatt & Cooper deed, of three-fifths of the mine for the sum of $300,000, to John V. Farwell and other Chicago parties. On the same day the entire property was conveyed to Wirt Dexter, in trust for all parties interested, the trust deed securing to Davies, Fritz, Oviatt, Cooper and George R. Clark (the latter being a partner of Oviatt & Cooper), two-fifths of the mine in certain proportions, the trust to be executed after the Chicago parties should be reimbursed the $300,000 purchase money and expenses out of the proceeds of the mine. Davies testified on part of the appellants, that an understanding was arrived at between himself and Fritz to procure the bond and share in the profits to be realized upon a sale of the mine, before the bond was executed; and that this understanding or agreement was reduced to writing afterwards; also that at the time of these transactions he was not aware of the fact that Fritz was expecting to receive commissions from the appellants. Fritz, on the contrary, testified that he told Davies that he expected to be paid commissions, and he further testified that he had no agreement for an interest in the bond until after the terms and conditions of the contract with Davies were all settled by the execution and delivery of the bond. He also testified to having informed Finnerty, subsequently to the giving of the bond, that he expected to acquire a contingent interest in the property. This statement is denied by Finnerty.

We have no hesitation in declaring as a proposition of law, that if Fritz exerted his influence with appellants to procure the bond in the name of Davies, in pursuance of a secret understanding with Davies, that the bond when obtained should be held for their joint benefit, such conduct

was an exercise of bad faith toward the appellants, amounting to a fraud in law. It was an abandonment of his agency, and upon discovering the facts, appellants had the same right to regard him as a purchaser with Davies, as if his name had been inserted in the first instance as an obligee in the bond. It was an attempt to assume the relations of both agent and purchaser without the knowledge and assent of the sellers, and if the facts are proven, the misconduct constitutes a bar to the recovery of commissions. In the case of Stewart v. Mather, *supra*, Chief Justice Dixon, speaking for the court, concerning this double relation of agent and purchaser, very pertinently observes: "The relations are wholly incompatible with each other, and can not be combined in the same person. The law will not permit it. Assuming the character of purchaser, the person so acting necessarily abandons that of agent, and can claim nothing in that capacity in his negotiations with the former principal." If, however, the fact should be found as sworn to by Fritz, that no understanding or agreement was made whereby he was to be interested in the bond until after its delivery to Davies, we are of opinion that the foregoing principles are inapplicable to the facts. We will therefore consider next how the law should be administered upon this hypothesis.

The general rule undoubtedly is, that the duties of the agent continue, and commissions are not due until he has effected a bargain and sale by a contract which is mutually binding on both vendor and vendee. Love v. Miller, 4 Cent. L. J. 152, and authorities cited. But where an agent has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, he has performed his duty, and if from any failure of the owner to enter into a binding contract, or to enforce a contract against the purchaser, the sale is not completed, the agent may recover his commissions. 1 Parsons on Contracts, p. 90; Moses v. Bierling, 31 N. Y. 462; Phelan v. Gardner, 43 Cal. 310.

The sale in this instance was not complete upon the execution of the bond, owing to the peculiar nature of that instrument; and the duties of the agent, therefore, continued for certain purposes. But they did not continue for the purpose of negotiating a sale for the appellants. That branch of his duty was fully performed, and as to it he was discharged. It remained for the agent to do what he could to consummate the sale contracted, and any act of his which would interfere with its consummation, would be a breach of his duty. The reason that the commissions were not due upon the execution of the contract of sale, was that this contract was not mutually obligatory upon both vendor and vendee, and because the purchaser produced was not willing to enter into a contract of this nature. The bond in question was one of those ordinary title bonds, so extensively employed in the mining regions of this State, by means of which those desiring to speculate in mines before purchasing the same outright, procure from the owners an option to buy on payment of a stipulated price, within a fixed period of time. The obligor binds himself to execute a deed to the obligee, on performance of the condition; no obligation is executed by the obligee; he pays the purchase money and receives a deed; otherwise he suffers the time for performance to lapse.

So far as the owner of the property and his agent are concerned, the execution of such instrument is to be regarded, during its existence and prior to default, as a sale of the property. Neither can execute any other sale in the name of the former proprietor. But the obligee may contract a sale of the property, on his own account and at any price he can obtain, by virtue of the title which he is to acquire under his bond. He may likewise employ an agent for such purpose, and unless the duties of such agency would conflict with the interests of the obligor in the bond, he may employ for this purpose the same person, who, as agent of the owner, brought the property to his notice, and through whose influence the obligee became interested therein.

What could there be in this new relation of the agent which would be inconsistent with the interests of his former principal, and his continuing duty in respect to the completion of the former sale? We have seen that no duty remains as to a further or other sale, and that in respect to such duty he is discharged. The price, terms and conditions of the sale are all settled, and have been inserted in the bond; as to these matters no discretion or duty remains. A sale of the property under the bond to other parties is contemplated by the bond itself; hence the act of assisting the obligee in such sale is not prejudicial to the interests of the obligor; neither does it necessarily conflict with the consummation of the first sale, but is much more likely to be in furtherance thereof, as the effect of a re-sale is to realize the money which is to mature upon the bond. There is, therefore, nothing inconsistent in the new relation; and if the agent may become the agent of the purchaser in such case, he may for the same reasons become jointly interested with the purchaser, after the execution and delivery of the bond, without on that account forfeiting his claim for commissions. These views are sustained by the following authorities: Story on Agency, sec. 31; Short v. Millard, 68 Ill. 292; Hinckley v. Arey, 27 Me. 364; Munn v. Burges, 70 Ill. 604; Wortman v. Skinner, 1 Beasley (N. J.), 358; Boehlert v. McBride, 48 Mo. 506; Pridgen v. Adkins, 25 Texas, 394.

No specific instructions were given upon either of the foregoing propositions respecting the relations which Fritz sustained to the appellants, or his conduct toward them; and in view of the testimony, we think the jury was not sufficiently advised upon these points. It is true no such instructions were prayed by the defendants, but the court rejected instructions which were prayed on the subject of appellee's misconduct, and gave others instead upon its own motion. In such case it became the duty of the court, not only to instruct correctly, but fully, on

the subject. The instructions so given were excepted to, and error assigned thereon, and, as we have seen, they omit to cover material points upon which the recovery may have depended.

Referring now to the relations which Fritz sustained to the purchasers, as bearing upon his right to recover commissions, we are of opinion that the doctrine of public policy was carried too far in the instructions given on this point. The appellants were not prejudiced by this error, but in view of the fact that the cause must be returned for another trial, we deem it proper to express our views on this point.

The inquiry whether Fritz forfeited his right to claim commissions by reason of assuming inconsistent relations to the purchasers, should have been limited to the original contract of sale. We have attempted to show that his employees were not legally interested in any other; that it was a matter of indifference to them what future contracts should be made, or by whom they should be made. Their remaining interest was simply the payment of the purchase money named in the bond and if it was paid it was wholly immaterial to them whether it came from the private funds of Davies, from the moneys of Oviatt & Cooper, or whether it was advanced by the Chicago parties. Holding as we do, that if Fritz procured his interest in the bond in good faith, after its execution, and not in pursuance of a secret understanding or agreement previously made with Davies, both Davies and Fritz might enter into any contract with other parties respecting the property which they might be able to effect, not inconsistent with the terms of the bond, it results that such contracts would be separate transactions, wholly independent of the original transaction out of which this contract has arisen, and between different parties. It would be foreign to the present investigation to inquire what relations appellee sustained to such other parties, growing out of subsequent transfers affecting the property. Such inquiries might become pertinent in a litigation directly involving such transfers, and between the parties thereto.

Whether Fritz occupied the relation of agent to Davies, depends upon a question of veracity between them, and upon this point no error is perceived in the instructions. If Fritz's concealing from Davies his agency to sell for the owners, induced Davies to undertake, in connection with himself, the purchase and sale of the mine under an agreement to divide between them the profits arising from the transaction, such facts bring Fritz within the rule of public policy announced by the court, and avoid his commissions, whether the appellant had knowledge of the double relation or not.

We think the court erred in giving to the jury the plaintiff's sixth instruction. Tatem made no unconditional offer to buy the mine at the sum of $260,000. He did not even examine the mine, and the proof that he would have purchased at this price was insufficient to authorize the jury in finding that he was prevented from buying the mine at this sum, by the refusal of the owners to sell. Whether the verdict was affected by this instruction or not, we can not know, but it is quite certain that it was improperly given.

For the errors mentioned, the judgment must be reversed and the cause remanded.

Judgment reversed.

NOTE. 1. The duties of agents or brokers are clearly defined in the foregoing opinion, and the rule which defeats their claims for double commissions is ably expressed and strikingly illustrated by the hypothesis assumed in the discussion. Whether the agent in becoming interested in the subject of the purchase was guilty of bad faith toward his principal, the owner of the mine, is made to turn upon the question of whether this interest was acquired pursuant to an arrangement entered into while his relations with the vendor continued. This would have been settled by the verdict, but for the giving of an instruction, based upon an assumption that one Tatem, a purchaser, brought forward by the agent, offered the sum, at that time demanded for the mine ($260,000) whereas the evidence was that he only offered $250,000, and the price was then raised to $275,000. 2. There is one portion of the opinion however, which, though not decisive of the case, lays down a principle which will probably not be universally accepted. That is, that it is error for the court to fail to instruct fully where it assumes to instruct at all, upon a point where proper instructions are not prayed. It is generally regarded as the duty of counsel to advise the court of the law, and it is not customary, if proper, to remand a cause for failure of the trial court to notice points overlooked by the representatives of one or other of the parties. This practice however, is not without precedent. Connor v. Chicago, etc. R. Co., 59 Mo. 285, was reversed for the refusal of an instruction which could not have been properly given without modification. The language of the court on page 295 is: "The fifth instruction in this case should have been given if modified," etc., and upon this point there was sufficient concurrence to remand the case.

PAROL TRUST FOR WIFE'S BENEFIT — WHEN VOID AS TO CREDITORS.

MARTIN v. LINCOLN.

Supreme Court of Tennessee, April Term, 1880.

A husband purchased a house and lot, paid for it, but had the title made to a third party, conveying it by absolute deed, with no trust whatever on its face. A parol trust was attempted to be asserted in favor of the wife, on the ground that the conveyance was so intended when made. *Held*, that as against creditors of the husband the claim of the wife could not be maintained; that the right of the creditor was to subject the land, as appeared from the face of the deed, which was recorded, in connection with the facts, and creditors could not be defeated in this right, except by deed or declaration of trust in writing, and duly registered, or noted for registration, as required by the registration laws.

FREEMAN, J., delivered the opinion of the court:

On the 29th of April, 1861, George W. Lincoln purchased the property in controversy, on Madison street, in the City of Memphis, of J. W. Rodgers. The price seems to have been between $35,000 and $50,000, which was paid by said Lin-

coln. He caused a deed to be made to the same to his brother-in-law, D. C. Love, who resided in the City of Nashville; the same being soon after registered in the county of Shelby. This deed simply conveyed the legal title absolutely to said Love. It is claimed to have been intended as a settlement by Lincoln upon his wife, Mary A. Lincoln, and that at some time after it was made, the trusts in favor of the wife were made known to said Love, and he consented to hold the same for the use and benefit of the wife. The precise time when this trust was so made known is not clearly shown in these records. It is further claimed that Love, in September, 1864, executed an instrument acknowledging this trust, to said Mary A. In addition it is argued that in several answers to bills filed in other cases, and in the answer to the present bills, he acknowledges the trust, and that in some one of these ways the trust is sufficiently manifested and so definitely made out as to be valid and enforceable as between her and the creditors of her husband seeking to enforce their debts in this proceeding.

These bills are filed by creditors of G. W. Lincoln, in 1865, seeking to make this lot in Memphis liable for their debts. The theory on which most if not all of them go in the main, is that the conveyance was made to Love directly, and assuming that he held the property in trust for Mrs. Lincoln, that it was but a voluntary conveyance to her, and that G. W. Lincoln was not in condition to make such a settlement on his wife, and therefore such conveyance was fraudulent and void, as to existing creditors at least, and in addition it is also charged that it was part of a meditated scheme of fraud by which he conveyed his property to his brother-in-law for the benefit of his wife, with the purpose of thus covering it up and preventing such creditors from reaching it; and being fraudulent in fact as to existing creditors, is thought to be alike void as to subsequent creditors, after the registration of the conveyance.

As to the first proposition that the conveyance was voluntary and not enough means were reserved to meet existing liabilities, after careful examination of the proof in these cases, we do not think it is sustained. It is not deemed necessary to go into the testimony to sustain this conclusion. It is sufficient to say that we think the evidence abundantly shows that he was able to meet every obligation shown against him, whether individual or as security for others, up to the time of occupation of Memphis by the Federal forces in June, 1862. In fact the weight of the testimony would show that he so continued after his removal to Nashville in 1863 perhaps, and until sometime in the year 1864, when his banking business was broken up, and his bank suspended, caused by the failure of Kirtland & Co., of New York. The fact that one of these debts now sued on, a security debt, existed before the conveyance, can not change this view. We must test this matter by the state of things existent at the time it was made, and not by after events occurring during the perilous times of the war, when fortunes, as we know, were made and lost in a day, as the result of the changing fortunes of the strife.

As to the question of fraud in fact, we find some circumstances of suspicion on the face of the transaction, but not of sufficient weight to say that this charge is sustained. The gravest inference in this direction is to be drawn from the conveyance having been made to Love, with no declaration of the assumed trust expressed in the face of the deed, and the fact that he knew nothing of the conveyance or purpose for sometime after it was made, possibly not until September, 1864, when he executed the paper, claimed to have been a declaration or recognition of the trust. This paper will be noticed more particularly hereafter. It is assumed to have been conveyed to Love with a parol trust for the benefit of the wife, and thus intended as a settlement. If he reserved ample means, as we think he did, to meet his liabilities, we can see no evidence in the facts shown in this record from which we can infer a purpose to defraud any existent creditors, nor to provide against future liabilities, in contemplation of insolvency, in such way as to deceive those who might trust him. In this view it was but the prudent precaution of a husband against future contingencies, such as may exist in any case where such a settlement is made on a wife or child by the husband or father. He had been advised by a friend in whom he seems to have reposed much confidence, thus to secure property to his wife and daughter, and probably the conveyance was made in pursuance of this advice.

The case then presented and the question to be decided is whether as against creditors of the conveyor, seeking to enforce debts, a conveyance without consideration to another, absolute on its face, but with an intention subsequently made known to the conveyee, that he shall hold the land so conveyed for the benefit of the conveyor's wife, can give the wife the right to hold the land as against such creditors; or, it may be more shortly stated, whether such a parol trust in favor of the wife, can be set up as against the creditors of the husband, in land conveyed by the husband to another for her benefit. We think this the real question, and that it is fairly raised on the facts stated in the bills as well as those stated in the answer, though not made the theory of the bills in which such facts are stated. The principle laid down by this court in Bartee v. Tompkins, 4 Sneed, 638-9, that where the facts are stated in the pleadings, though the ground relied on in the theory of the relief sought is not sustained, yet under the general prayer relief may be granted, such as the facts stated in the pleadings and shown to exist will justify, we think applies in this case.

The fact of the conveyance to Love, absolute on its face, with the claim of a parol trust in favor of the wife, is found substantially given in all the bills, and is the distinct basis of the claim asserted by the wife in her answers. It is also insisted that the instrument executed by Love, 23d September, 1864, is a manifestation and declaration of the trust in writing; and we had as

well dispose of this matter at this point as anywhere else. On looking at this instrument we find it is, so far as its material terms are concerned, as follows: "In consideration of $1 to me in hand paid, I hereby agree to make or cause to be made to Mary A. Lincoln or her trustee, a quit claim deed for the following described lot," giving a description of the same; in conclusion reciting that it is the same conveyed by deed of J. W. Rodgers to him, 29th of April, 1861, and registered in Shelby County.

So far from this sustaining the idea of the trust, or being a declaration of the trust, in favor of Mrs. Lincoln, it goes far to raise a suspicion as to the existence of the trust now claimed to have been the original object of the conveyance, or any knowledge of it, at least on the part of Love at this time. In the first place, if he held under the trust as claimed, why not execute a declaration of said trust, and thus furnish the evidence of that which had already been declared in parol? Why contract to convey to her or her trustee, if he was already that trustee, with the legal title in him for her benefit, as is the theory of respondent in her answer? It might well be doubted, assuming that he was a trustee, and the parol trust valid, whether he could convey to a third party or to the beneficiary, the legal title then vested in him, and thus denude himself of the trust; no authority being pretended to this effect in the declaration of the trust originally. Suppose the conveyance had expressed the trusts now claimed on its face, would not such a trustee be vested with the legal title charged with the trust, so that he could not have denuded himself of it, without a breach of duty, except by death, or authority of a court of chancery, or other court having authority to receive his resignation, and pass his accounts and appoint a successor to act in his stead? This being so, certainly a party holding the legal title with a parol declaration of the trust, assuming its validity for the present, would have no more authority to denude himself of the trust, or convey to another, thus appointing another trustee, than in the case of a trustee where the declaration of the trust was in writing. See Perry on Trusts, vol. 1, sec. 77. This instrument is but a contract on its face to convey; and if what we have suggested is true, it is a contract that would be a breach of the trust to execute.

But passing from this, it does not even allude to the trust in any way, nor declare its terms. If it had been intended so to do, it would have recited the facts that the conveyance to him had been made in trust, for the benefit of Mrs. Lincoln, and that he thus held it. The failure to make the slightest reference to the trust is conclusive against the assumption that this can be held a declaration of the trust sought to be set up by respondent. In addition, it is axiomatic in all cases where a trust is to be enforced, whether in writing or by parol, that it shall be clearly defined; or to use the language of Mr. Bispham (Principles of Equity, p. 97), in reference to trusts in writing. "The writing, however, must declare with sufficient certainty, what the trust is." This could only be held as a voluntary agreement on its face to convey to Mrs. Lincoln. Love being theholder of the legal title, without consideration, the purchase money having been paid by Lincoln, nothing more appearing, it would be the same as Lincoln making this contract at this time; and it is clear at this time, he was not in condition to have made such a settlement on his wife. Resort must be had to the parol trust, if this trust can be sustained. As to the answers of Love and Lincoln, relied on, we need but say, they are after the rights of complainants sprang up and cannot be interposed to affect them, even if otherwise good, which we need not decide. In addition, the trust must stand on the declaration made prior to or at the time of the conveyance. Perry on Trusts, sec. 77. Resort must be had to the assumed parol declaration of the trust, and it must stand or fall on this.

The question then is, whether the parol trust here sought to be set up under the facts of this case, can be sustained, as against creditors of the husband? The question as to whether it could be enforced against Lincoln, the maker or conveyor is not before us, and not necessary to be discussed or decided.

This precise question, we do not think, has been adjudged in our State. We have various cases, where trusts have been recognized and enforced, made out by parol proof, as between the party claiming the beneficial interest, and the convevee of the legal title; but the question as between a creditor of the maker of the conveyance, and the claimant under such parol agreement for a trust, was not in these cases. In the case of Saunders v. Harris, Judge Cooper delivering the opinion of the court, refers to it, as a question not necessary to be decided, and it was not discussed. It is evident, however, he saw there were difficulties in the question, but the case not calling for it, did not decide it. It is claimed in argument that the principle settled by our cases sustains the contention of respondent in this case. We proceed to notice the leading cases decided by this court, and ascertain their bearing on the question. It is several times stated in opinions *arguendo*, that a parol trust may be established, as to lands, as well as in personalty. Such is the language of Judge Cooper in the Saunder's Case; but it was not so decided; only an incidental remark, the case being one of a trust in slaves, that had always been treated as personalty, and the rules of law applicable to personalty applied to them. It is proper to say here, that it is a very different question, as between a party accepting the legal title, with a verbal agreement to hold for the use of another, when that third party asks the enforcement of a trust as against him, from the one presented in this case, when a creditor comes with his execution or a bill, seeking to subject the property to the payment of his debt. The principles and policy of our registration laws, must necessarily have an important bearing in the solution of such a question.

The first case, and the leading one we believe on the general question, is McLanahan v. Mc-

Llanahan, 6 Hump. 99. A father conveyed land to his son, the son being bound for him as surety, and also a creditor. The father was indebted to others. The father was old, infirm, of intemperate habits, and disqualified from judicious attention to his affairs. The son took the title, with the understanding that he should imdemnify himself for debts and liabilities, pay the other debts of his father, and by this means save a home for the benefit of the family of the grantor. Soon after this the grantor died, the son paid off his debts, selling a portion of the land for this purpose, and using means of his own also in paying the debts. The widow and heirs filed their bill to be restored to the possession of the land. The defendant admitted the trust in the answer, and submitted to an account. The court held that he was a mortgagee, as to liabilities existent at the time of the conveyance, and trustee as to balance; and decreed after he should be re-imbursed, the title should go to complainants.

This case does not raise the question now before us, nor is the question of enforcing a parol trust, where it is resisted for this cause, raised for decision in the case. The answer, as we have said, admitted the trust, and consented to the account. This case on its facts may well stand as the law, but gives no aid to the position maintained in the case now before us.

The case of Haywood v. Ensley, 8 Hump. 461, where a party whose land was about to be sold, procured Ensley to purchase it, with an agreement that he would hold the land as security for the money advanced, and when this was repaid, the owners were to have it. The party by this arrangement prevented others from bidding, as well as the procurement probably of some other person to buy the land, and allow it to be redeemed; so that the element of a fraudulent advantage as well as the agreement was in this case. The judge delivering the opinion, says it is true in that case that the jurisdiction of a court of equity to enforce the execution of a trust declared by parol in land, if plain and unambiguous in terms, and established by clear and satisfactory evidence, is well established, and was admitted by counsel in argument; but this must be understood as applying to the case before the court; and in view of the facts the statement was correct. In fact it was held to be a case of mortgage, the conveyance of the legal title being shown to have been as security for the money advanced, by parol, in accord with numerous cases in our State. This is shown by the decree as well as the prayer of the bill, which was to redeem and have an account of the rents and profits, which was ordered by the court.

This case was decided correctly, and we feel no disposition to disturb its authority, however much the author of this opinion might himself doubt the soundness, as others of our judges have done, of the propriety of this departure from the rule requiring titles to land to be in writing. But it is obvious this case does not meet the question we have now before us. The contest was between the parties to the agreement. The holder of the legal title had obtained a legal advantage by agreeing to permit the redemption, and it would have been a gross fraud if he had been allowed to retain this unconscientious advantage, as against parties who had reposed confidence in him. Suffice it to say, no creditor was seeking to enforce his claim against the creator of the trust, as in this case. These are the leading cases, and we believe the only ones, where the trust was declared in real estate. They all have the element of fraudulent advantage obtained by the holder of the legal title, making it fraudulent and iniquitous in him to seek to retain it.

The other cases are generally cases of conveyance of legal title, with parol agreement to hold as security for payment of money advanced, and the bills were to redeem. This doctrine is now well settled in our law, and need not be discussed. They were also cases of negroes, and therefore for personal property.

None of them were cases where a creditor was seeking to reach the property, while the legal title was in the voluntary conveyee, and an assertion of claim by an assumed beneficiary by proof of a parol declaration of trust, made either at the time of the conveyance, or subsequent to it, as in this case. See the cases of Saunders v. Harris, 1 Head, 185; English v. Tomlinson, 8 Hump. 378; 10 Hump. 349. We need not refer to other cases, such as the case of McClellan v. McLean, 2 Head, 687, and the cases there referred to, where a party agrees that if the property is given by will, he will give it to such persons as are designated by the testator as the objects of his bounty. All these cases stand on the ground of fraudulent advantage, and the court enforces them in favor of the beneficiaries. This is all well established.

Let us now come to the case before us. The party making the conveyance, or causing it to be made, is the debtor. It is made to Love without consideration. Assume that he agreed to hold it for her, and this proven by parol, and that under the above cases, she might as against him, on the ground of it being a fraud and an iniquitious advantage, compel him to hold the title for her, and at any rate he would be estopped from resisting her claim as against him, how stands the right of the creditor as against this claim?

In the view we take of this question we need scarcely go into the vexed question whether an express trust such as the one now before us, could be created or raised in parol at common law. It is true that the seventh section of the statute of frauds, 29 Charles II, is not embodied in our statute. This section required that all declarations or creations of trusts or confidences in any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing. We need but say that we think from the authorities we have examined, that this was a vexed and unsettled question at the date of the statute. Mr. Perry in his work on Trusts, vol. 1, 2nd ed. sec. 75, refers to several text-writers, such as Saunders and Lewin, who are cited as saying that uses being of a secret na-

ture. were usually created by parol declaration, and trusts like uses, were averable at common law and might be declared by word of mouth without writing. He cites Chief Baron Gilbert, however, as reconciling most of the conflicting authorities, by saying, "at common law a use might have been raised by words. upon a conveyance that passed the possession by some solemn act, as a feoffment; but where there was no such act, then it seems a deed declaratory of the use was necessary; for as a feoffment might be made at common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses. Thus a man could not covenant to stand seized to uses without a deed; but a bargain and sale by parol has raised a use." It is probable the weight of authority is in favor of this view; and such became the rule at an early day, though originally when the feoffment was the almost universal mode of conveyance, it was understood that no writing was necessary, there being but little writing in England in those early days, as we know from the history of her people.

In this view, the seventh section we take it is to be held as passed rather to settle this disputed question, than as furnishing reason for the inference that the law had been settled otherwise, and it required the statute to change it.

But passing from this to the question before us, we take it to be settled by the policy of our registration system, from its inception down to the present time, that creditors and innocent purchasers (that is, purchasers without notice) stand on the same footing as to all lands owned by their debtor; secs. 2074 and 2075 of our code embody these principles distinctly. The principle of the latter section as to all estates subject to execution or other proceeding for enforcing debts is, that they shall be subject to the claims of a creditor of the grantor, unless defeated by a conveyance or instrument in writing, proved or acknowledged, and noted for registration, or registered; and a *bona fide* purchaser who gets a conveyance first and has it registered, prevails over another less diligent.

If this be correct, we need hardly say that a purchaser from Love without notice, who paid his money and procured a conveyance in writing, and had the same registered, would get the title over a trust like this, even if it is conceded it is well declared by parol. See cases cited, King's Dig. vol. 4, sec. 11709, *et seq.* If this be so, on what principle a creditor can be made to stand lower than a purchaser, it would be difficult to see.

But further the estate conveyed to Love, Lincoln paying the consideration, nothing more appearing, and as the conveyance stood on the register's books, on the facts stated, was an estate subject to execution at law, the judgment against Lincoln would be a lien on the land thus conveyed. 1 Hump. 491, and 6 Hump. 95-96. This being so, if the principle of these statutes is to be carried out, how can the creditor be overridden except by a conveyance, complying with the rule thus established? It is a legal estate subject to execution or other process by a creditor. It can only then, in fairness, be defeated by a conveyance, noted or registered as the statute requires. On what principle can we make a distinction in favor of a party claiming the beneficial interest? It is the assertion of an unregistered title against a creditor, whose rights are otherwise clear. To make this, however, stronger, suppose this land had been sold by valid contract to third party, and conveyed upon full price paid, but the deed had not been registered, there could be no doubt that the creditor would have taken it. Or suppose the conveyance had been to Love in trust, with all the trusts plainly expressed on the face of the deed, would not the same result have followed? If so, on what principle can a mere parol conveyance or creation of the trust stand higher than one in writing? There is no exception in the statute in favor of deeds with trusts and those without. There is nothing in reason or sound policy it seems to us that demands or permits such a distinction to be made. So that even conceding the trust might be such a one as could be enforced, as against Love, on the part of Mrs. Lincoln, to prevent a fraud, and on the ground of estoppel on his part to deny her right, yet as against a creditor she would still have a right unprotected, unless we can say under our registration system a parol conveyance or declaration of trust shall stand higher than the most formal instrument in writing, or even one supported in addition by a valuable consideration paid to the conveyor. This would be absurd.

Without presenting other considerations on this aspect we think these views conclusive of this case. We therefore hold the creditors have the right to enforce their claims for the reasons stated.

It is probable we could reach the same conclusion on another principle. It is settled that the declaration of trust by the grantor must be before or contemporaneous with the conveyance. Perry on Trusts, vol 1, sec. 77. It is also added by the same author that the grantor can not, after he has parted with the estate, charge it with any trust or incumbrance after such conveyance; and this is said to be the rule where parol trusts are allowed. We certainly see no evidence of a definite declaration of the trust in this case before or at the time of the conveyance to Love. It is shown that such was his purpose; but that such purpose was ever declared, we very much doubt from the whole evidence in this record. Certainly Love did not hear of it for some time after, as evidenced by his answer to the Schoenover Bill filed in 1865, where he says he was informed and believes it was so conveyed to him in trust; and then the instrument of 1864 would indicate that if he had ever known of the trust, it had passed out of his mind at that time, to say the least of it.

The result is that the decree of the chancellor is reversed, and a decree will be drawn in accord with this opinion.

Costs to be paid out of the fund arising from sale.

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES SUPREME COURT.

October Term, 1879.

CORPORATIONS—CREDITORS BILL AGAINST DELINQUENT SUBSCRIBERS TO STOCK.— The liability of a subscriber to the capital stock of a corporation is several and not joint, and he becomes a several debtor to the company as much so as if he had given his promissory note for the amount of his subscription, and a judgment creditor of an insolvent corporation is at liberty to proceed against one or more of delinquent subscribers to recover the amount of his debt without an account being taken of other indebtedness and without bringing in all the stockholdors for contribution. And a previous call need not be made though the subscription by its terms is to be paid "as called for by said company."—*Hatch v. Dana*. Appeal from the United States Circuit Court for the Southern District of Illinois. Opinion by Mr. Justice STRONG. Decree affirmed. Reported in full 21 Alb. L. J. 470.

TRADE MARKS — LETTERS OF ALPHABET. — The manufacturer of goods has no right to the exclusive use as a trade mark of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. And letters or figures which by the custom of traders or the declaration of the manufacturer of the goods to which they are attached are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one, like the adjectives of the language. Accordingly, where a manufacturer of cloth adopted as a mark to distinguish the best quality of its goods manufactured the letters "A C A," and to denote inferior qualities the letters "B," and "C," and "D" *Held*, that it could not claim the exclusive right to use the letters "A C A" as a trade mark.—*Amoskeag Manufacturing Co. v. Trainer*. Appeal from the United States Circuit Court, Eastern District of Pennsylvania. Opinion by Mr. Justice FIELD. Judgment affirmed.

SALE—DELIVERY—PERSONAL PROPERTY DELIVERED WHERE AGREED, TITLE, PASSES.—B had a contract for the sale to a railroad company of a specified quantity of wood which was to be delivered at the yard of the company at $5 per cord. Being indebted to the W bank he arranged to sell the wood he had collected for the purpose of filling the contract, some of which was in the yard of the company but not received by it, and some on the way thither, in payment of his indebtedness and a further advance. This arrangement was approved by the railroad company and carried out, B giving his note for the further sum advanced with interest. The bank also retained notes given by B for the former indebtedness. B delivered at the yard of the company an additional quantity of the wood and some of the wood was on the way thither when all of the wood was seized by defendant in error under attachments against the property of B. None of the wood had been actually received by the company. The notes of B had been taken more as memoranda than any thing else, and had not been surrendered to B, because he had not called at the bank for them. *Held*, that the transaction between the bank and B constituted a sale to the bank of all the wood which the latter delivered at the yard of the railroad company. Upon being deposited at that place with the intention or for the purpose of completing the sale the absolute title to the wood passed to the bank. Nothing more remained to be done by the seller. He was not bound by the contract with the bank to deliver it to the railroad company but at its yard only. In legal contemplation it then came into the possession of the bank, and was thereafter subject to its control. It was no longer subject to be reached by the creditors of the seller, upon the mere ground that the title had not passed or a complete delivery made. The delivery in execution of the contract at a specified place not belonging to the seller was such a delivery as accorded with the nature of the property. When placed in the yard of the railroad company, in pursuance of the agreement, the acts of the parties united with the previous verbal contract, resulting in a consummated obligatory agreement, depriving the seller of all further control of the property, and putting it under the exclusive dominion of the buyer with a perfected title thereto. From that moment the indebtedness of the seller to the bank to the extent of the contract price of the wood actually delivered at the designated place was discharged, and the property was thenceforward at the risk of the buyer. Actual manual possession of the bank by its agents was, under the circumstances and regarding the nature of the property, both impracticable and unnecessary to a complete delivery. These conclusions are abundantly sustained by authority. Benjamin on Sales, book 1, pt. 2, p. 134; Hilliard on Sales, ch. 7, pp. 124-140; Browne on Statute of Frauds, ch. 15, p. 323.—*Wyoming National Bank v. Dayton*. In error to the Supreme Court of Wyoming Territory. Opinion by Mr. Justice HARLAN. Judgment reversed.

SUPREME COURT OF IOWA.

April, 1880.

TAXATION — WHEN EQUITY WILL INTERFERE — PRINTERS IMPLEMENTS "TOOLS OF MECHANICS" WITHIN EXEMPTION LAW. — 1. To correct an irregular or erroneous tax, application must be made to the board of equalization, and equity will not interfere. But the court will nevertheless restrain a tax that is illegal, as where imposed under an unconstitutional law or levied without authority of law upon property that is exempt. 2. Sec. 797 of the Code, provides that "the farming utensils of any person who makes his livelihood by farming, and the tools of any mechanic not in either case to exceed three hundred dollars in value," are exempt from taxation. *Held*, that the term "tools" includes the press, types, imposing stones and other implements necessary for a printer to carry on his business. That the art of printing is a mechanical trade, and that a printer is a mechanic, can admit of no question. That the statute did not contemplate that the costly machinery now in use in large printing establishments, such as power presses operated by steam, should be exempt, is evident from the fact that the limit of exemption is fixed at $300; but that the ordinary hand press of a printer should be included in making up the amount of the exemption is just as evident as that the hand loom of a weaver, the bellows of a blacksmith, or the work bench of a carpenter should be held to be exempt under the statute. Reversed. Opinion by ROTHROCK, J.—*Smith v. Osburn*.

INSURANCE— AUTHORITY OF AGENT TO EXTEND TIME FOR PAYMENT OF PREMIUM.—Action on policy of fire insurance for a portion of whose premium the company had taken the plaintiff's notes. The policy provided that if default was made in the payment of any installment of premium upon any premium

note for thirty days after due, the company should not be liable for any loss happening after that time and before payment. One of the plaintiffs's installments fell due Nov. 1, 1876, and was not then paid. It appeared that one K, an agent of the company, agreed with him, after the installment became due, to extend the time of payment until he (plaintiff) should receive a certain pension; that he received his pension March 8, 1877, and on the same day went to K's office to pay the installment due upon his insurance note, but did not find him, and the next day, about four o'clock in the afternoon the property insured was destroyed by fire. It appeared also that K's authority from the company extended only to receiving applications for insurance and collecting and transmitting premiums; he was not authorized to issue policies. *Held*, that K had no authority to extend the time and that the company was not liable. Reversed. Opinion by ADAMS, C. J. BECK, J., dissenting.—*Critchett v. American Ins. Co.*

SUPREME COURT OF MISSISSIPPI.

April Term, 1880.

NEGOTIABLE PAPER—INDORSEMENTS—WARRANTY OF GENUINENESS.—1. The rule is well settled that an indorser warrants the genuineness of the indorsements on a bill of exchange and that he has a valid title to the paper. 2. Should it be ascertained, even after payment of the bill, that any of the indorsements are forged, the drawee can recover back from the person to whom he paid it, and so each preceding indorser may recover from the person who indorsed it to him. 3. The drawee is bound to know the signature of the drawer, but not of the indorser. Judgment affirmed. Opinion by GEORGE, C. J.—*Williams v. Tishomingo Sav. Inst.*

CRIMINAL PROCEDURE — ALL WITNESSES WHOSE NAMES ON INDICTMENT NEED NOT BE EXAMINED. —The district attorney in the court below closed the case for the State without examining two witnesses whose names were marked as State's witnesses on the back of the indictment, and who were present at the trial: the accused moved the court to compel their introduction and examination by the State upon the ground that the testimony already delivered showed that they were present at the killing and under such circumstances it was the duty of the prosecution to put them on the stand. This motion was denied. *Held*, no error, the matter being one for the discretion of the court which would not be reversed except where it appeared that actual injustice had been done. There are several English cases decided at *nisi prius* which lay down the doctrine with more or less distinctiveness, that it is incumbent upon the crown, in a prosecution for a homicide, to produce every attainable witness who was present at the killing. The doctrine seems to have met the approval of the Supreme Court of Michigan in two cases, though when analyzed these are rather adjudications that it is not permissible for the prosecution to present an isolated part of the *res gestæ* without a full development of all that occurred, than a declaration that it must examine all the witnesses who were present at the transaction. The doctrine is utterly repudiated and denied by the Supreme Court of North Carolina who, though one of its most eminent members, Judge Ruffin, declared that it had "neither principle nor practice to support it," and that "it was the province of the solicitor and not of the court to determine who should be State's witnesses." We can find no other adjudications on the subject, and no allusion to the doctrine in any American text books. We are not prepared to go to the length of the Supreme Court of North Carolina, in holding that the court would have the right under no circumstances to compel the production by the State of the testimony of the eye witnesses of the homicide. If the prosecuting officer should content himself with proving the bare fact of killing by one who had witnessed that act only, resting his case upon the legal presumption of guilt thereby implied, and if it was made evident by the testimony produced that there were other witnesses present who saw the whole transaction, it would, we think, be always within the sound discretion of the court to compel their production by the State, if in attendance or easily attainable. Affirmed. Opinion by CHALMERS, J.—*Morrow v. State.*

CRIMINAL LAW — JURY SHOULD BE INSTRUCTED AS TO PUNISHMENT, WHEN. — The appellant was convicted of murder. The only question presented for the Supreme Court was whether the trial court erred in refusing to give an instruction to the jury informing them that in case they failed to affix the penalty of imprisonment for life in the State penitentiary then it was the duty of the court to impose the penalty of death. *Held*, that this instruction should have been given, and its refusal was error. It is true that as to business transactions and civil conduct every man is presumed to know the law. This presumption we know in most instances to be false, and is indulged in only from a necessity which mainly arises from the impossibility of determining how much or how little of law any man knows, but this presumption is exactly to the contrary as to jurors, so far as it relates to principles of law applicable to the case before them, and about which the court is asked to charge them. As to these, they are presumed to know nothing, and to derive all their knowledge from the court. Reversed. Opinion by GEORGE, C. J. CHALMERS, J., dissenting: The jury have nothing to do with the punishment which the law affixes to a conviction of guilt, and the accused has no right to demand that the jury shall he instructed with regard to it. The punishment which the law affixes to the crime of murder in this State is death, and that punishment follows by operation of law upon a verdict of guilty. This punishment the jury may, if they elect so to do, commute into imprisonment for life. When they have been by the court instructed as to their prerogative in this regard, they have received all the information which the accused have the right to demand that they shall receive.—*Walton v. State.*

SUPREME COURT OF MICHIGAN.

June, 1880.

A MARRIED WOMAN NOT LIABLE ON A CONTRACT FOR HER BENEFIT MADE WITH HER HUSBAND.—A married woman can not be sued for the value of a furnace put into her own house when the ownership of the house is known, but the work is done by her husband's order, and in reliance on his responsibility. Morrison v. Berry, 42 Mich.; Newcomb v. Andrews, 41 Mich. 518; Vanneman v. Powers, 56 N. Y. 39; Woodruff Iron Works v. Adams, 37 Conn. 233; Wright v. Hood, — Wis- —. Opinion by GRAVES, J.—*Holmes v. Bronson.*

SHERIFF'S BOND—DEFAULT AS TAX-COLLECTOR. A coroner of Saginaw county, being designated to perform the duties of sheriff, qualified and gave the statutory bond required of the sheriff. Afterwards a

Liquor Tax Law was passed under which he was required to collect large assessments, and failing to pay over part of his collections, judgment was rendered against him and his sureties on his official bond. The sureties bring error. 1. Duties not yet existing and not germane to an office are not within the contemplation of sureties on the official bond, nor properly covered by their obligation. Gaussen v. United States, 97 U. S. 584; Converse v. United States, 21 How. 453; Com. v. Holmes, 25 Gratt. 771. 2. To bind the sureties the duties must plainly belong to the office. St. Louis v. Sickles, 52 Mo. 122; Mayor, etc. of Rahway v. Crowell, 11 Vroom, 207; Citizens' Loan Association of Newark v. Nugent, Id. 215; Amherst Bank v. Root, 2 Met. 536; Kitson v. Julian, 30 E. L. & Eq. 326. 3. The collection of taxes by the sheriff is assumed to be a duty foreign to his position, by Comp. L., 1027, which provides for independent security for its performance. 4. A sheriff's duties relate to the execution of orders, judgments and process of courts; the preservation of the peace; the arrest and detention of persons charged with the commission of public offenses; the service of papers in actions, etc.; they are connected with the administration of justice and not with the collection of the revenue. People v. Edwards, 9 Cal. 286. 5. Sureties on an official bond are discharged when the duties and obligations of the office are essentially charged by statute and their risk increased. Pybus v. Gibbs, 88 E. C. L. 902; 38 E. L. & E. 57; Oswald v. Mayor of Berwick, 26 E. L. & E., 85. The imposition of new duties does not change the old office but invests the officer with a new office. Skillet v. Fletcher, L. R. 2 C. P. 469. Opinion by GRAVES, J. *White v. East Saginaw.*

MARRIED WOMAN'S PROMISSORY NOTE—AGENTS.—A married woman gave her note payable to a creditor of a firm in which her son was a partner, to be used as security, and without her knowledge her son gave the note in the creditor's agent and took back an assignment of the debt to her, which had been already executed. In a suit on the note she disputed the consideration. *Held*, 1. The omission to file an affidavit of non-execution of the note does not waive the defense of a want of capacity to make it except on a parcular consideration. 2. In Michigan a married woman can not become personally liable on an executory promise unless it concerns her separate estate; and a note given for any other consideration is void. DeVries v. Conklin, 22 Mich. 255; West v. Laraway, 28 Mich. 404; Emery v. Lord, 26 Mich. 431; Ross v. Walker, 31 Mich. 120; Jenne v. Marble, 37 Mich. 319; Kitchell v. Mudgett, Id. 81; Carley v. Fox, 38 Mich. 387: Johnson v. Sutherland, 39 Mich. 579; Russel v. Peoples Savings Bank, Id. 671; Gantz v. Toles, 40 Mich. 725. There is no presumption of the validity of such an undertaking, and a binding consideration must always be proved whether the note is negotiable or not, and probably so even if value is expressed, since her power to contract is only statutory and can not be extended beyond the constitutional and statutory limits. Powers v. Russell, 26 Mich. 179; Emery v. Lord, Id. 431; West v. Laraway, 28 Mich. 454; Johnson v. Sutherland, 39 Mich. 579. 3. The disability of coverture is as much a protection against a *bona fide* holder as any other person (Johnson v. Sutherland, 39 Mich. 79), but the original payee can not be a *bona fide* holder. Pickle v. Dow, Id. 91. 4. A married woman can not give her agent any power which she does not possess herself, and her agent can not bind her except concerning her separate property. Persons dealing with them must inquire into their powers. Opinion by CAMPBELL, J.—*Kenton Insurance Co. of Kentucky v. McClellan.*

SUPREME COURT OF MISSOURI.

May Term, 1880.

CRIMINAL LAW — EVIDENCE OF ACCOMPLICE — PROOF OF OTHER LARCENIES. — Defendant was jointly indicted with one Arnott for grand larceny. A severance was ordered, and defendant pleaded not guilty. A *nolle prosequi* was entered as to Arnott, and he was used by the State as a witness against the defendant. On the trial, the State was permitted to prove other larcenies committed by defendant against the objection of defendant. The prosecuting attorney offered to read two other indictments against Arnott, which, upon inquiry by the court, he stated were also against defendant. He then stated that his object in offering them was to show that Arnott had not been wholly released from liability to punishment, to meet the insinuations of defendant's counsel that said witness was fully released in consideration that he would implicate and testify against defendant, and to show, also, that whatever might be the result of the case on trial, Arnott must still answer these indictments. The court permitted these indictments to be read. *Held:* 1. The testimony as to other larcenies by the defendant and Arnott at other times was inadmissible. 2. The indictments offered were inadmissible for the purposes stated, and were calculated to mislead the jury. The State had no right to show by indirection that defendant was under indictment for other offenses similar to the one for which he was then being tried. It was competent for the defendant to show that Arnott was jointly indicted with him as an accomplice, and had received immunity from that prosecution in consideration for his testimony against defendant, and there the inquiry on that subject should have been stopped. The extent of the inducement held out is not a proper subject of inquiry before the jury. Reversed and remanded. Opinion by HOUGH, J.—*State v. Reavis.*

CRIMINAL PRACTICE — PLEA OF GUILTY UNDER PROMISE OR EXPECTATION OF LOWEST PUNISHMENT.—Defendant was indicted for breaking jail, under Rev. Stat., sec. 1455. The bill of exceptions was signed by bystanders and accompanied by affidavits as to its truth and an indorsement of facts by the special judge who tried the case. According to the affidavits, which the court adopts as less likely to err, it appears that the attorneys for defendant, immediately after the election of the special judge, and before he took his seat on the bench, had an interview with him, and were led to believe by his words and acts that if defendant would plead guilty the lowest punishment would be inflicted; that this understanding was communicated to defendant who consented to plead guilty; and that upon said plea the special judge sentenced defendant to two years in the penitentiary, the highest punishment for the offense charged. Accepting as true the statement of the special judge, the fact remained as stated in the affidavits, that the defendant made the plea of guilty under the belief that by so doing a punishment less severe than the maximum would be inflicted. Immediately upon the judgment being announced, and before it was recorded, the attorneys for defendant asked leave to withdraw the plea of guilty, which was refused, and the judgment entered as announced. *Held*, that in either view of the facts it would have better comported with the proper exercise of a sound judicial discretion had the special judge permitted the withdrawal of the plea of guilty and the substitution of the usual plea. 2 Archb. 334; 2 Hawk. P. C. 469; 2 Hale P. C. 225; 1 Bish. Crim. Prac. sec. 465; Davis v. State, 20 Ga. 674. Reversed and re-

manded. Opinion by SHERWOOD, C. J.—*State v. Stevens.*

QUERIES AND ANSWERS.

QUERIES.

47. Does sec. 10, cap. 46, W. S. Mo. as to Divorce have reference to *ex parte* proceedings? See 26 Mo. 163. L. & E.

ANSWERS.

35. [10 Cent. L. J. 437.] A denial of the title and right of possession of the parties does put in issue their joint interest. No persons can be made parties to a suit at law, but those who have joint interests, and their interest must be of the same nature and character, or there will be a misjoinder of parties. Neither of the parties can recover without proof of the other's right of possession. Proof must be given of their joint possession or joint right of possession, otherwise there will be a material and fatal variance between the allegations and the evidence. B. B. BOONE.
Mobile, Ala.

36. [10 Cent. L. J. 437.] Judge Story (Eq. Juris. sec. 400), uses this language, "Whatever is sufficient to put a party upon inquiry, that is, whatever has a reasonable certainty as to time, place, circumstances and persons, is in equity held to be good notice to bind him," and in a note among other authorities he refers to Green v. Slayter, 4 Johns. Ch. 38, see also Coy v. Coy, 15 Minn. 119. In the light of these authorities as to what constitutes notice, we think that as D has knowledge of the deed from B to C, and that it conveys the same property that A attempts to convey to him, he, D, is chargeable with notice, and would not be justified in completing his purchase from A without ascertaining the character of the title that B, and B's grantee, C, have to the property. If D does complete the purchase from A without ascertaining the character of C's title and from whence it is derived, he, D, can not be protected against C, because in view of the authorities he is not an innocent purchaser without notice. B. B. BOONE.
Mobile, Ala.

38. [10 Cent. L. J. 437.] We think the judgment is competent evidence. In Whitman v. Henneberry, 73 Ill. 109, 5 Cent. L. J. 167, it was held that where a court having jurisdiction, made a decree for the partition of the lands of a deceased owner, establishing who were the heirs of such owner, a purchaser of one of such heirs, in an action of ejectment brought by him against a stranger to the partition suit, is not bound to produce evidence of the heirship of his grantor outside of the decree, in the absence of proof to the contrary. It was also held that the doctrine that judgments and decrees are evidence only between the parties and their privies does not apply in such a case. B. B. BOONE.
Mobile, Ala.

42. [10 Cent. L. J. 437.] In this case it seems that there was a mutual mistake among the parties as to their rights in the land. Nothing is clearer than the doctrine that a bargain founded in mutual mistake of the facts constituting the essence of a contract will avoid it, although made by innocent mistake. Daniel v. Mitchell, 1 Story, C. C., 173; Glassell v. Thomas, 3 Leigh (Va.), 113; Hammond v. Allen, 2 Sum. C. C., 387. If both parties to a contract for the sale of land are under a mistake with regard to the vendor's title, which was supposed to be perfect, but proves void, a court of equity will relieve the grantee from the contract. Hadlock v. Williams, 10 Vt. 570. We think in the case stated by the querist that a court of equity would rescind the deeds made between the parties and remit them to their original rights under the will. B. B. BOONE.
Mobile, Ala.

CURRENT TOPICS.

A very considerable alteration in the English law as to master and servant will be made by the bill just introduced by the Government, in fulfilment of the promise made at the beginning of this session of Parliament to present a law "determining on a just principle the liabilities of employers for accidents sustained by workmen." The act modifies to a great extent the present law as to common employment. It provides that every workman, his wife, children, or legal representatives shall have the same right of compensation and remedies against the employer as if he had not been a workman of, nor in the service of, the employer, nor engaged in the work, when any injury is caused to such workman in the five following ways: 1. "By reason of defective works, machinery, plant, or stock connected with the business of the employer." As the law stands at present, both in England and America, a master would only be liable for injury happening to a servant from such a defect, if it were proved that this defect was brought to his knowledge. But the above clause would dispense with this necessity for showing a *scienter* by placing servants on the same level with third parties. Railroads would then become liable to compensate their servants who were injured in an accident caused by the breaking of an axletree, or a defect in the permanent way, as well as passengers. 2. "By reason of the negligence of any person in the service of the employer who has superintendence entrusted to him." 3. "By reason of the negligence of any person in the service of the employer to whose orders or directions the workman was bound to conform." 4. "By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer." 5. "Or in obedience to instructions given by any person delegated with the authority of the employer on that behalf." On the whole the new act comes very near making a master liable for the negligence of one servant in causing injury to a fellow servant.

It must always be a question of much importance to the bar, under what circumstances one who has been found guilty of debauching its privileges and has been removed from its ranks, may be restored to membership in the profession. We have witnessed in this State within a few weeks an application of this character made in a somewhat peculiar method. Two years ago, one Bowman was disbarred in this city for a series of breaches of trust and professional frauds which we are ready to believe have had few parallels in the history of the American bar. Recently he applied to the Supreme Court to be restored to the rolls, and his application was refused on the ground that the time within which, under our statute, the court could interfere at all, had not yet arrived. What we wish to call attention to here are simply some of the reasons which he presented to the court in support of his application. These were, a petition signed by a number of citizens who stated that they were familiar with the facts of the case, and believed that he ought to be restored to the bar, and a petition signed by a few members of the profession, personal friends even in adversity doubtless, to the same effect. So far as the applicant himself was concerned he expressed neither contrition for his past misconduct nor gave any assurance of reformation; he even maintained the propriety of the acts for which he had been disbarred. It must be plain to everyone that an application for re-admission to the bar is not in the nature of a petition for a pardon. A

bank clerk convicted of embezzlement might be released from prison because his punishment had been sufficient, but he would hardly be restored to his post without at least an acknowledgment of a change of opinion as to the morality of appropriating other peoples' money to his own use. A disbarred attorney asking to be re-admitted to the post that he has betrayed and disgraced, and unwilling to give any guarantee for his future conduct, can expect no different answer from the court than the bank thief to whom we have referred would be sure to receive from his former employer.

There must always be another difficulty in the way of re-admitting a disbarred attorney. This difficulty arises where the court to which the applicant presents himself has had but little personal knowledge of him, while the court in which he intends to practice, if admitted, may have lost all confidence in his honesty. An attorney, for instance, may have been struck from the rolls of the Circuit Court for dishonorable acts as one of its members. There may be jurisdiction in the Supreme Court to restore his name to the rolls, but it is plain that they can not grant him those necessary qualifications, without which the title of an officer of the court is a name and nothing more. That which is at the foundation of the privileges of an attorney—the mutual respect and confidence which exist not only between the courts and their officers, but between the officers themselves, cannot be granted by the highest tribunal in the land. The Supreme Court may clothe such a person with power to sign his name to papers, to appear for litigants, to address the court or the jury, but they can not compel the judge before whom he appears, to believe him, any more than they can compel his associates or his opponents to trust him. The spectacle, during a trial, of the opposing counsel calling upon him at every stage to verify his words by proof, or the judge requiring him to substantiate all his statements by the testimony of those whose word he is able to rely upon, would scarcely be edifying to the administration of justice; yet where an attorney has been convicted of betraying the interests of clients, and is, in the opinion of both bench and bar, devoid of common honesty, such a practice would not only be reasonable, but would be really the only safe one for the protection both of the court and the parties. As said by the court in *ex parte* Steinman, where an attorney had been removed from practice for a gross libel on one of the judges: "His voluntary act having wilfully disrupted the essential, mutual confidence between himself and the court, his continuance in his office could only tend to obstruct or embarrass the court in the discharge of its official duties. In order to dispatch—indeed, in order to execute its diverse duties properly, the word of the attorney before the bench must be received and accepted by the court in multitudinous instances. But that can not be done where confidence is wanting." Such a dilemma as we have spoken of is liable at any time to arise, as the Supreme Court cannot always obtain the evidence which is necessary as to the estimation in which an applicant for re-admission is held by the profession among whom he is seeking to be placed. Fortunately there is one way in which the court may always act safely, viz.: by requiring him to show that his petition for re-instatement is indorsed by the prosecutors who conducted the proceedings which resulted in his disbarment. and by the judge who heard the evidence and pronounced his sentence. This is a condition precedent required by the Governor before acting upon an application for pardon, and the Supreme Court may very properly in such cases follow the usage of the Executive.

RECENT LEGAL LITERATURE.

BIGELOW'S BILLS AND NOTES.

The second edition of Mr. Bigelow's Cases on the Law of Bills, Notes and Checks is an improvement on the first. The entire work has been re-written and the notes are much enlarged. We find here collected and printed in full in one volume 160 cases on the subject; certainly a valuable collection to any lawyer examining any of the topics of the book. There seems to be a popular demand by the profession for works of this character, which enable a lawyer to carry into court under his arm all the cases which he may need, but which, otherwise, scattered through many volumes of reports, would encumber several tables. It contains over 700 pages and is handsomely printed and bound.

JARMAN ON WILLS.

Many a lawyer has found in the elaborate treatise o Mr. Jarman on Wills, invaluable aid in his investigation of questions arising in testamentary cases. All such who remain in active practice will be pleased to receive a new edition of that work, with full notes, bringing it down to the present time, and including the latest decisions. The announcement that two such editions were to be presented this year to the American bar, was received with some grains of doubt as to which of the two would prove the more complete and the more thoroughly acceptable. The first volume of the Jersey City edition, now before us, brings with it the evidence that great pains must be bestowed on the rival edition, in order to insure to it any discrimination in its favor by the bar. We certainly think the industry and faithfulness of Messrs. Randolph and Talcott, in annotating that part of Mr. Jarman's work included in his first thirteen chapters, are in the highest degree commendable. Our readers will understand how it is that the work, under this editorship, expands into three volumes, when the extent of the editorial work is mentioned. Nearly one-half of the matter in the present volume is of this class. The notes to chapter three on the Personal Disabilities of Testators, largely exceed the original chapter in extent. Among them is one note of over fifty pages, containing a full summary of all the modern American and English cases on the subject of Unsoundness of Mind as a Disability. Another note of nearly equal length, added as an appendix to ch. 9, sec. 1, treats very fully of the American doctrine of Gifts to Charitable Uses. But we have not space to speak of all the

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The Law of Bills, Notes and Checks, Illustrated by Leading Cases. By Melville M. Bigelow, Ph. D. Harvard, of the Boston Bar. Second Edition. Boston: Little, Brown & Co. 1880.

A Treatise on Wills, by Thomas Jarman, Esq. In Three Volumes. Vol. 1. Fifth American, from the Fourth London Edition, with Notes and References to American Decisions, by Jos. F. Randolph and Wm. Talcott, of the New Jersey Bar. Jersey City, N. J.: Fred. D. Linn & Co. 1880.

editorial work in detail. It appears on nearly every page, and seems to be so extensively distributed as to indicate that no branch of the subject has been overlooked.

If the same thorough work be bestowed upon the succeeding volumes, we think the bar will have a very complete view afforded of the American law upon the subject of Wills, according to the plan of Mr. Jarman's work, and running *pari passu* with the English law. We hope to have the opportunity to speak of these forthcoming volumes as they deserve. From the fact that two competing editions had been announced, we had feared an attempt on the part of the Jersey city editors to push the publication of their book with undue haste, at the expense of correctness; but we see no evidences of any such intention, upon the face of the book. It is clearly and handsomely printed, and elegantly bound, furnishing a comely addition to one's book shelves. The second volume of this edition of Jarman's treatise is promised for an early day, and its appearance may be looked for weekly.

NOTES.

——The real advantage of serving on a jury has been discovered by an individual in Ohio. At a recent meeting of the State Bar Association, a county judge in presenting a measure to improve the efficiency of the system for compelling citizens to perform jury duty, said that not long ago in his county a man presented himself with a request to be employed in jury work, citing as a reason that his physician had told him he must not use his mind, and it seemed to him that if he could get upon a jury he would have an excellent opportunity of giving his mind a rest.

——The meaning of "benefit of clergy" is not always understood even by lawyers, the interest in its investigation being historical rather than practical. Its origin may be traced to the regard which in former times was paid by the princes of Europe to the church, and the privileges which the clergy obtained as a consequence, one instance being exemption of places consecrated to religious purposes from arrest for crime, which led to the institution of sanctuaries; and also the exemption of clergymen in certain cases from criminal punishment by secular judges; from this came the benefit of clergy, the claim of the *privilegium clericale*. It was at first necessary that the prisoner should appear in his clerical habit and tonsure at trial; but in the course of time this was considered unnecessary, and the only proof required of the offender was his showing to the satisfaction of the court that he could read, a rare accomplishment, except among the clergy, previous to the fifteenth century. At length all persons who could read, whether clergymen or lay clerks (as they were called in some ancient statutes) were admitted to the benefit of clergy in all prosecutions for offenses to which the privilege extended. Sir Francis Palgrave, in his "Merchant and Friar," gives a vivid picture of the proceeding that took place at these trials. A thief had been apprehended in Chepe, in the very act of cutting a purse from the girdle of Sir John de Stapleford, Vicar-General of the Bishop of Winchester, and he was condemned to be hung at Tyburn. "Louder and louder became the cries of the miserable culprit as he receded from the judges; and just when the sergeants were dragging him across the threshold, he clung to the pillar which divided the portal, shrieking with a voice of agony which pierced through the hall: 'I demand of Holy Church the benefit of my clergy!' The thief was replaced at the bar. During the earlier portion of the proceedings the kind-hearted Vicar-General had evidently been much grieved and troubled by his enforced participation in the condemnation of the criminal. Stepping forward he now addressed the court, and entreated permission, in the absence of the proper ordinary, to try the validity of the claim. Producing his breviary, he held the pledge close to the eyes of the kneeling prisoner; he inclined his ear. The bloodless lips of the ghastly caitiff were seen to quiver. '*Legit ut Clericus*,' instantly exclaimed the Vicar-General; and his declaration at once delivered the felon from death, though not from captivity."

——In a recent case in New York, the Court of Common Pleas refused an order upon an execution debtor for an assignment of his seat in the Stock Exchange that it might be sold to satisfy the judgment. Van Hoesen, J., said: "A seat in the Exchange does not fall within any of the classes into which the subjects of property are divided. It is not capable of manual delivery or appropriation; it is not a domestic animal; nor an obligation; nor a product of labor or skill, nor a right created by statute. * * * * The advantages of membership are very important and of great value to their possessors, and from that consideration an argument has been drawn that the seat to which they are incident may be sold by the officers of the court. There is no doubt that if membership in certain clubs were put up at auction a very large bonus could be realized by members disposed to retire. But few would contend that therefore the privileges of social enjoyment afforded by the Century, the Union or the Union League Club was property subject to legal process. A distinction has been drawn between membership in the Stock Exchange and membership in a social club, in view of the fact that the former was organized for business purposes and that a member on withdrawing is permitted to get back the money which he paid on acquiring his seat. I fail to see the force of this distinction. Whether the club be founded to aid business or to promote pleasure, the privilege of membership is attached to the person of the individual." The court referred to cases in which such a right might be reached. "There is no doubt if a seat be sold, the proceeds of the sale, after the payment of claims due to members of the board, may be reached by proper process. This is the view of every court which has had occasion to express an opinion on the subject. It by no means follows, however, that the seat itself may be seized by the sheriff or taken possession of by a receiver. It may well be doubted if a seat in the Exchange be property. It is true that Mr. Justice Miller, of the Supreme Court of the United States, in the case of Hyde v. Wood, 4 Otto, 523, said that he thought it was property; but the Supreme Court of Pennsylvania, in two carefully considered decisions, in which the decision of Mr. Justice Miller was thoroughly reviewed, came to the opposite conclusion." It may be added that views in opposition to those entertained in this case have been expressed by Choate, J., in the United States District Court at New York.

ST. LOUIS, JUNE 18, 1880.—No. 3.

The price of this addendum is one dollar per year, to subscribers of the Central Law Journal only. It is not issued every week, but as often only as there are sufficient opinions filed to fill one sheet. Subscribers who have already paid their subscription to the JOURNAL *may obtain it for the remainder of this year by remitting sixty cents. Remittances may be made in three cent postage stamps.*

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SUPREME COURT OF INDIANA.

May Term, 1880.

PLEADING — DEMURRER — DAMAGES.—1. When a complaint consisting of several paragraphs is demurred to as an entirety, the demurrer will be overruled if either paragraph is sufficient. 2. Under sec. 7 of the act to provide for a general system of common schools, it is the duty of the court, in an action against a township trustee upon his official bond for a failure to discharge any duty relative to schools and school revenues, to assess upon the amount of the verdict or recovery, ten per cent. damages, to be included in the judgment. Affirmed. Opinion by HOWK, J.—*Goldsberry v. State.*

PROMISSORY NOTE—ASSIGNMENT—EVIDENCE.—This was an action by appellee against appellant on a promissory note, alleged to have been executed by appellant and another to Edward L. Champer, and by him assigned in writing to appellee. Appellant answered by a verified general denial and also affirmatively. *Held*, as the assignment was not the foundation of the action, it was not necessary to make either it or a copy a part of the complaint. But as the indorsement of the note was not given in evidence on the trial, appellant's motion for a new trial should have been granted. 55 Ind. 136. Reversed. Opinion by SCOTT, J.—*Keith v. Champer.*

BANK CHECKS—ACCEPTANCE.—A bank check has all the requisites of a bill of exchange except that it is due on demand, without days of grace, and if dishonored requires no protest for non-acceptance nor for non-payment. There is no implied contract in favor of the payee against the drawee that he will either accept or pay the check. The drawee is no party to the check until he accepts it; and a party can not be sued upon an express contract before he enters into it. The fact that the drawee has funds in his hands belonging to the drawer sufficient to pay the check does not change the rule. Edwards on Bills, 405; Byles on Bills, 18; 1 Blkf. 104; 1 Gray, 605; 7 Hill, 577; 57 Ind. 232; 60 Ind. 220. Placing a check on a canceling hook or fork by the mistake of an officer of the bank, and afterwards correcting the error, does not amount to an acceptance of a check, nor in any manner affect its validity. 7 Ex. 389; 44 Eng. C. L. R. 184. Affirmed. Opinion by BIDDLE, C. J.—*National Bank of Rockville v. Second Nat. Bank.*

REAL ESTATE—SALE FOR TAXES—ESTOPPEL IN PAIS.—This was an action in which the State claimed title to certain lands by escheat, under section 761 of the Code. The following facts were in evidence: Upon the death of Joseph Ernsberger, an alien residing in Switzerland, January 10, 1860, the land at once escheated to the State. In February, 1862, the land was sold for delinquent taxes of 1859, 1860 and 1861, to Nathaniel West. West assigned his certificate of sale to Reid, who, in February, 1864, received the auditor's deed for the land. In 1873 Smith acquired title, by mesne conveyances, and has been in possession ever since. Lasting improvements have been made upon the land since its sale for taxes. These facts show that the State sold the land for delinquent taxes which partly accrued after she became the owner of the land; that the proper public officer made a deed of conveyance of the land two years after the sale for taxes, at a time when the State owned the land, and the State made no claim to the land until twelve years after the sale for taxes—and it must be presumed that she collected her taxes from it during all this time—while it was held and claimed adversely under the sale. These facts amount to an estoppel *in pais* of the State from claiming the land. To allow the State to recover the land after it had been sold for taxes and she had derived revenue from it and acquiesced in the sale for twelve years, during all of which time parties in good faith have held it adversely, would strike the general sense of mankind as inequitable and unjust. It does not become the State to insist upon such a claim as against the right of her citizens. 2 Hill, 215; 3 Peck. 224; 7 Cal. 527; 4 Bing. 231; 8 Wend. 480; 4 Pet. 1; 4 Ind. 149; 22 Ind. 36; 62 Ind. 188. Reversed. Opinion by BIDDLE, C. J.—*Reid v. State.*

CRIMINAL LAW—FORMER ACQUITTAL—EVIDENCE.—This was an indictment and conviction for rape. On the trial the appellant offered in evidence the record of a former indictment and the record of acquittal thereon. It appears from the bill of exceptions that before offering these records the appellant proved that the original indictment was lost; that he was the same person and that both indictments charge the same offense. *Held*, the question whether a person has been tried for an offense is a question of fact to be determined by the jury and is proven partly by the record and partly by evidence outside the record. The court should have allowed all the evidence to go to the jury and left the question of former acquittal for the jury to determine. Reversed. Opinion by SCOTT, J.—*Dunn v. State.*

REVIEW OF JUDGMENT—NEW MATTER—DILIGENCE.—A complaint for review of judgment must show clearly and unequivocally new matter having a material bearing upon the judgment complained of, which new matter would probably reverse, or at least materially modify such judgment. Second, the new matter relied upon in a complaint for review must be such as is, or may be, clearly distinguished from newly discovered evidence, which, if discovered during the term at which the judgment was rendered, would be a cause for a new trial, in a motion therefore, under section 352 of the Code and, if discovered after such term, might support a complaint for a new trial under section 356 of the Code, but which, in no event, would sustain a complaint for the review of a judgment on the ground of material new matter discovered after the rendition of such judgment. Third, the complaint must show, by the facts alleged therein, that the new matter relied upon as the cause for a review, could not have been discovered before the rendition of the judgment sought to be reviewed, by the exercise of reasonable diligence. Fourth, that the complaint has been filed without delay after the discovery of the alleged new matter. 18 Ind. 329; 41 Ind. 124; 58 Ind. 418; Busk. Prac. 271. In the case at bar the complaint fails to show either that the new matter could not have been discovered before the judgment rendered on confession in the original case by reasonable diligence, or that the case was filed without delay after the discovery of such alleged new matter. Reversed. Opinion by HOWK, J.—*Francis v. Davis.*

FEES AND SALARIES OF COUNTY AUDITORS—STATUTE CONSTRUED.—Sec. 22 of the Fee and Salary Act of 1879 (Acts 1879, 137) provides that the auditor of each county shall be allowed $1,200 per year for his services, and $100 per year for making all reports required by law to the Auditor of State, and further that, "when the population of his county exceeds 15,000, as shown by the last preceding census taken by the United States, the additional sum of $125 for each 1,000 inhabitants in excess of 15,000, shall be allowed said auditor, in addition to his salary of $1,200; and if the population of said county shall be more than 20,000, said auditor shall be allowed the additional sum of $100 for each 1,000 inhabitants in excess of 20,000 in said county." *Held*, that the auditor of each county, without rgeard to its population, shall be allowed for his services a fixed salary $1,200 per year. When, however, the population of the country exceeds 15,000 such auditor shall be allowed in addition to his salary, the sum of $125 for each 1,000 inhabitants in excess of 15,000 and not in excess of 20,000. If the population of the county shall be more than 20,000, such auditor shall be allowed the additional sum of $100 for each 1,000 inhabitants in excess of 20,000 in such county. Where a statute is susceptible of several widely different constructions, this court knows of no better means for ascertaining the intention of the Legislature than that afforded by a history of the statute, as found in the journals of the legislative bodies. 54 Ind. 270. Affirmed. Opinion by HOWK, C. J. *Edgar v. Commrs. Randolph Co.*

WILL—WORDS OF LIMITATION—CONDITION IN RESTRAINT OF MARRIAGE.—This case turns upon the construction of the following clause of a will: "I give and bequeath to my wife, Mary Steele, all my real and personal property, etc., to be hers during her natural life, or widowhood; after her death, or marriage, and after my youngest child that may then be living," the property to be divided among the children, share and share alike. If the words quoted, construed with the residue of the will, import that Mary Steele is to have a life estate in the property devised on condition that she remain a widow during that time, the life estate will be absolute and the condition will fail, inasmuch as the statute declares void all bequests and devises in restraint of marriage. Do the words "or widowhood," taken in connection with the other parts of the will, import a condition or only a limitation? If they are words of condition, the condition is void. If they are words of limitation only, the estate of Mary Steele terminated at her marriage. By the terms of the will the children took just the estate which the law would have cast upon them by descent had they not been mentioned in the will at all. If that is the case, the devise to them is a nullity and they must be deemed to have taken by descent and not by purchase. 4 Kent Com. 506; 7 Cush. 161. The case presented arises between the heirs of the testator as such, and the devisee, Mary Steele, untrammeled with the supposed rights of any devise over, after the termination of the estate devised to Mary Steele, and freed from any of the circumstances that have led to the conversion of a condition into a conditional limitation. If the testator had devised the property to his wife "during her widowhood," the words would have been words of limitation and not of condition, and would have set bounds to the estate devised, not cut down by any condition. 58 Ind. 207. But the words of the will, "to be hers during her natural life or widowhood," clearly import a condition in restraint of marriage and the law renders that condition void, leaving the devise for life valid. The words, "to be hers during her natural life," precede the conditional words and limit the estate devised to the life of the devisee. They are clearly words of limitation and they show an intention on the part of the testator that the devise should be cut down by what followed. Then follow the words, "or widowhood." These words signify that if the devisee should cease to be a widow the life estate thus devised should also cease. A condition is a condition, call it by what name we will. Say that the language of the will creates, not a condition, but a conditional limitation, or a limitation upon a limitation, or an alternate limitation, or otherwise disguise its import as plausibly as we may, still the meaning is unmistakable and that meaning is that the devisee is to have the property "during her natural life," only on the condition subsequent that she continue a widow. This subsequent condition is void and the devise for life valid, though the devisee has since married. Affirmed. Opinion by WORDEN, J.—*Stilwell v. Knapper.*